E. Failure to Actively Consult with Patrol Officers as to Specific Knowledge.

102. The allegation has been made with some force that John MacIntyre failed to consult with patrol officers outside of the Detective Department at any time during the investigation of the Seale murder. It has been suggested that this was dishonest or incompetent or both (T. v. 35, pp. 6421-6428). It has been suggested that this demonstrates such gross carelessness on the part of John MacIntyre that, in conjunction with other evidence, it indicates a malicious desire to prosecute, convict and imprison Donald Marshall, Jr., without some honest belief in his guilt. It is respectfully submitted that that is not the case at all. Any proven failure to consult, which we do not accept, did not at any time detract from the proper investigation of this crime nor did it result in any misdirection of the investigation from the unknown third person toward Donald Marshall, Jr.

Department Interaction in 1971

103. The operation of the Sydney City Police Force in 1971 was such that constables were not supposed to get involved in investigative work (T. v. 7, p. 1154). Communication from the constable's point of view would be made through the occurrence or crime report form (T. v. 7, pp. 1155, 1161-1162). There were no shift briefings permitting the foot patrols to know what the Detectives were doing or vice versa (T. v. 7, pp. 1172, 1210-1211). These general views expressed by Ambrose MacDonald were consistent with the evidence given by Howard Dean (T. v. 9, pp. 1484, 1488-1489, 1502, 1518-1519, 1530, 1538-1541), John

Mullowney (T. v. 9, p. 1565), John Butterworth (T. v. 11, pp. 1968, 1982), Wyman Young (T. v. 17, p. 3098), Arthur Woodburn (T. v. 20, pp. 3697-3698), and Richard Walsh (T. v. 7, pp. 11283-1286; T. v. 8, pp. 1332, 1335, 1338-1340, 1348-1350, 1358-1359, 1375-1376, 1406, 1416).

104. Walsh did indicate that normal practice would have detectives sit down and discuss what happened with patrolmen in particular cases through informal meetings in hallways or by being sent for (T. v. 8, pp. 1349-1350). Ambrose MacDonald confirmed this view, and his evidence includes examples of this being done (T. v. 7, pp. 1155, 1161-1162; 1138). Edward MacNeil explained how contact would occur:

> There was never any sort of formal approach to a matter like that. It was more on an individual - more on an individual basis. Certainly if any Constable had any information he would pass it on to the persons investigating the case and it wouldn't - it wouldn't be out of the normal for the investigators to - to ask the Constables either if they had any thoughts on the matter....(T. v. 15, p. 2622).

What the Patrolmen Knew and Were Directed to Do

105. Howard Dean, who was with Corporal Martin MacDonald, was the first police officer to speak directly with Donald Marshall, Jr. Dean stated that Marshall said at the scene that he and Sandy Seale had been stabbed by "a tall fellow with white hair and a short fellow" (T. v. 9, pp. 1474, 1478). A Crime Report subscribed with Dean's name (Exhibit 16 - R. v. 16, p. 11) confirmed that Marshall's description given was of a man

in his mid-forties who was "very tall" and had white hair. The second man was much shorter and younger. Dean says that he came across nothing during the balance of that Saturday morning shift which was relevant in any way to the circumstances of the stabbing, does not recall discussing the events of that evening with anybody when he came off shift and made no attempt to speak with any detectives before he went home as he did not believe that there were any detectives around (T. v. 9, p. 1488). Dean received no messages from any of the detectives and received no messages from anyone in the police department before coming back on shift at midnight (T. v. 9, p. 1489). Dean returned to his regular patrol without being given any further description of possible suspects and does not recall doing anything particularly directed to the stabbing again (T. v. 9, pp. 1490-1491). Thus, Dean does not recollect conveying this description by Marshall to anyone (T. v. 9, p. 1518). Dean does not recall anything in Marshall's description about the assailants looking like priests, or hearing an updated or changed description over the car radio (T. v. 9, pp. 1519-1520). Dean at no time tried to flesh out the description Marshall had given, and does not recall his partner doing so (T. v. 9, pp. 1524-1525).

106. Richard Walsh overheard conversation between Marshall and Dean at the scene with respect to the description of the assailants. Walsh recalled Marshall saying that one big man and one small man had been involved, both dressed in dark clothing (T. v. 7, pp. 1301-1302; T. v. 8, p. 1420). Walsh is

unsure about any mention of white hair (T. v. 8, p. 1420). Walsh at that time may have heard a comparison of these men to priests, but indicated that that may have first been mentioned the following Sunday afternoon when he came in contact with Marshall at Membertou (T. v. 7, p. 1301). Walsh received no direction with respect to any searching to be done or for what kind of description (T. v. 8, pp. 1411-1412). As to the information which he had received, Walsh does not recall doing anything to convey that information to anyone in the Detective Division (T. v. 8, p. 1335). Although he would not say that it had not happened, Walsh could not recall being questioned at any time by members of the Detective Division (T. v. 8, pp. 1338, 1349, 1350). An indication of what Walsh actually had in the way of description the night of the stabbing is indicated in the note of his partner for that night, Leo Mroz (Exhibit 16 - R. v. 16, p. 11). This note is supplementary to a notation under which Walsh's name appears describing the assailants as a very tall man in his mid-forties with white hair and a second much shorter and younger man. Mroz in his note discusses attempts to locate "the two described persons" in the note which appears on the same page. In his own occurrence report, Walsh does not repeat the description given by Donald Marshall but rather simply refers to the "two suspects described by Donald Marshall" (Exhibit 16 - R. v. 16, pp. 12-14). It was Walsh's impression that the taller man was the one with white hair when he was speaking with Donald Marshall, Jr. on the Sunday afternoon (T. v. 8, p. 1420).

107. Ambrose MacDonald received a description of the assailants from either Walsh or Mroz of two men, one tall, the other shorter, and one or both wearing a dark-coloured trench coat and possibly a beret or tam (T. v. 7, p. 1128). That night MacDonald got no direction from any superior officer or detective, was not involved in the investigation the following day and received no specific directions on his next shift (T. v. 7, pp. 1130, 1170, 1173-1174). MacDonald has no recollection of even seeing Sergeant MacIntyre until the evening of June 4, 1971 (T. v. 7, p. 1136). MacDonald indicated that the description according to Corporal Dean was what he had been looking for (T. v. 7, pp. 1163,1168-1169). It is the same as the description he recalls receiving from Donald Marshall, Jr. on the Sunday evening (T. v. 7, p. 1134).

108. John Mullowney worked at the St. Joseph's Dance on Friday night, May 28, 1971. He was not contacted by the Police Department after leaving the dance until he came into work the next morning (T. v. 9, p. 1558). Mullowney did get some briefing on the Saturday morning but was not given any description of possible suspects (T. v. 9, pp. 1559-1560). However, he also testified that he was aware Donald Marshall had given a description to some police officers the night before and kept it in mind (T. v. 9, p. 1562). Mullowney was given no specific description to go and search for, and really had no further involvement in the investigation other than the search for a weapon in the Park (T. v. 9, pp. 1564, 1586). Mullowney did say

that he did not recall any differences or changes in the description to be considered in this case, and agreed that the description he would have been using would have been based on whatever report had happened to be filed at that time (T. v. 9, p. 1587).

109. Edward MacNeil was a traffic officer with the Sydney City Police in 1971 and claimed to have no personal knowledge of the Seale case (T. v. 15, p. 2622). The notes of R.C.M.P. Officer Murray Wood suggested that he was at least present during a meeting between Wood and MacIntyre where a description of a man 45 to 50 years old with grey hair was passed along (Exhibit 40, T. v. 15, pp. 2619, 2622). For his part, MacNeil was never asked to look for two men including an old man with grey hair (T. v. 15, p. 2641). MacNeil did not recall his apparent involvement with Ebsary or even a knife incident in 1970 at this time (T. v. 15, p. 2623).

110. Wyman Young testified that he was never given any briefing by any detectives investigating the Seale stabbing, and in particular was never asked to be on the lookout for two men, including an old man with grey hair (T. v. 17, p. 3100, 3107). Young was never asked by the Detectives if he had had any recollection about people known to be involved in knife offences (T. v. 17, p. 3101). Indeed, Young agreed with the opinion expressed by counsel for Donald Marshall, Jr. that MacIntyre was the kind of person who only gave out information about a case when he chose to give it out (T. v. 17, p. 3105).

111. Arthur Woodburn received no instructions whatsoever about the Seale stabbing (T. v. 20, p 3697). John Butterworth, who worked the same shift as Woodburn, had no specific involvement with the Seale stabbing either (T. v. 11, p. 1970). That shift was off from the Friday afternoon before the stabbing until the Tuesday.

Specific Knowledge of Roy Ebsary/Jimmy MacNeil

112. The police officers who were patrol constables in 1971 generally did not know who Roy Ebsary was: Howard Dean (T. v. 9, p. 1522); Wyman Young (T. v. 17, p. 3094); and Arthur Woodburn (T. v. 20, p. 3696). John Mullowney did not know Ebsary (T. v. 9, p. 1565), although he did know of Jimmy MacNeil. The same goes for John Butterworth (T. v. 11, pp. 1981, 1988-1989). Norman D. MacAskill did not know Ebsary (T. v. 17, p. 3039), though once Ebsary was brought forward MacAskill recalled having seen him once at a shopping centre sometime before. Richard Walsh does not appear to have been asked about any personal knowledge of Roy Ebsary or Jimmy MacNeil. Ambrose MacDonald knew Jimmy MacNeil, and also knew the short-order cook from the Esplanade Grill to see him (T. v. 7, pp. 1147, 1167-1168). However, MacDonald did not know the short-order cook as Roy Ebsary and had never associated the two until 1982 (T. v. 7, pp. 1167-1168). "Red" MacDonald did not know Roy Ebsary by name (T. v. 10, p. 1667), and neither William Urquhart (T. v. 52, p. 9614) nor John MacIntyre (Exhibit 15 - R. v. 15, p. 10ff.) knew him at all.

113. The lack of knowledge on the police force about Roy Ebsary and Jimmy MacNeil seems to be confirmed as a reasonable state of knowledge on the basis of the general lack of knowledge about Roy Ebsary in the community. For example, Jimmy MacNeil testified that Roy Ebsary in 1971 was a regular at the State Tavern, and was known by the regulars as distinctive, and known to usually wear the kind of coat Ebsary was wearing on May 28, 1971 (T. v. 2, pp. 516-517, 596). However, MacNeil did not agree that Roy Ebsary stood out at the State Tavern (T. v. 2, p. 517). Roy Ebsary himself certainly did not feel that he would have been well known by the police and did not feel familiar with them (T. v. 1, pp. 209-212).

114. David Ratchford testified before this Commission that when he met Roy Ebsary in 1974 he knew that he had never seen Ebsary before, and had not known who Ebsary was. According to Ratchford, Ebsary was "absolutely not" a character on the streets of Sydney (T. v. 24, p. 4411). Donald Marshall, Jr. did not recognize either Roy Ebsary or Jimmy MacNeil, neither did Patricia Harriss (if she indeed met Ebsary and MacNeil that night at all), nor did George Wallace MacNeil, nor Roderick Alexander MacNeil, nor Debbie MacPherson, nor Linda Muise. Staff Sergeant Harry Wheaton says that Donna Ebsary says that the school children knew (T. v. 42, pp. 7738-7739), but this does not appear to be borne out by the first-hand evidence.

The Basis For Changing What the Patrols Were Looking For

115. The patrol officers were not the only officers

making notes or at least drafting reports on the night of May 28, 1971. At these Commission hearings notes identified by "Red" MacDonald were introduced (Exhibit 38) which contain two sparse descriptions but no reference as to which description related to the person who had stabbed Seale:

I. Heavy set.
Short.
Dark Blue Coat. To KNEES.
Hair - Grey.
Black Low shoes.
Wearing Glasses.
Dark Rims
#Tall - 5-11.
Black Hair
Clean Shaven
Corduroy Coat 3/4 Length
Brown in Colour

116. This Commission may find that Exhibit 38 and the descriptions contained in it were available to John MacIntyre on May 29, 1971. If that is so, there is one specific difference with the descriptions received by the constables on the night of the stabbing - that it was the short man who had grey hair, whether or not he did the stabbing. If Exhibit 38 was correct, and if that description was communicated to John MacIntyre on Saturday, May 29, 1971, that should certainly have been communicated through the Desk Sergeants on duty to the patrolmen

in case they observed anyone of apparent relevance to the description.

117. It is respectfully submitted, however, that no one - including John MacIntyre - saw these notes of "Red" MacDonald, or even had the contents communicated (T. v. 35, pp. 6412-6421). "Red" MacDonald told this Commission that he had a briefing with the Desk Sergeant Len MacGillivary after coming from the hospital:

> ...and I think from what I hear, he contacted patrol cars and advised them what to look for, for the rest of the night. (T. v. 10, p. 1663).

"Red" MacDonald did not answer the question about passing along the description to Sergeant MacGillivary, but did state that to the best of his personal knowledge that discussion with MacGillivary would permit the police to recognize if someone came back into the Park "fitting the description that I received from Marshall" (T. v. 10, p. 1663). However, the only crime report containing a description of the assailants and which would have been available to MacGillivary and subsequent individuals acting in the Desk Sergeant position would have been that subscribed with the names of Mroz, Dean, Walsh and M. McDonald - which has the short man being young and the tall man having the grey hair (Exhibit 16 - R. v. 16, p. 11). If MacDonald had told MacGillivary something different than had originally been reported, where was it recorded?

118. It is reasonable to believe that MacIntyre never saw or heard the description in MacDonald's notes. One factor to

consider on this is that "Red" MacDonald had worked beginning at 4:00 p.m. until midnight on Friday, was called back to work almost immediately after leaving at midnight, and continued to work until 4:00 a.m. approximately (T. v. 10, p. 1663), Saturday morning. "Red" MacDonald was not scheduled to work Saturday (T. v. 10, p. 1670). However, "Red" MacDonald testified that he was out to work at 7:30 a.m. (T. v. 10, p. 1670). According to "Red" MacDonald, MacIntyre came in at 8:30 a.m. or 9:00 a.m., there was a fifteen or twenty minute briefing, after which he and MacIntyre drove through the Park area three or four times to look around and see if anything "might pop up" (T. v. 10, pp. 1672-1676).

119. "Red" MacDonald testified that a search may have been conducted by John MacIntyre, but "I didn't conduct it". (T. v. 10, p. 1675). To the best of "Red" MacDonald's knowledge, some men from the day shift were asked to go into the Park area - how many he could not say (T. v. 10, p. 1674). As a result of that search:

> Well, like Sergeant Mullowney the day after reported picking up the kleenex with blood on it, you know...that was laying in the area for a day or so. (T. v. 10, p. 1676)

MacDonald cannot recall anything else happening that day except that Marshall was around the Police Station (T. v. 10, pp. 1677-1678). MacDonald could not say for sure when he finished either because "I didn't have to work" (T. v. 10, p. 1684). Perhaps the most crucial point however was stated when "Red" MacDonald was asked by Commission Counsel where the investigation stood at the

end of that first day:

> Well, I'm not sure if Sergeant MacIntyre had Donald Marshall in the office and took a statement from him. I'm not sure on that day.
>
> Q. I think it's fair to say, sir, the first statement that we're aware of is dated the 30th, which would be the following day?
>
> A. <u>On a Saturday.</u> (T. v. 10, p. 1685)

At that point Commission Counsel corrected "Red" MacDonald's evidence as to what day May 30 would have been.

120. It is respectfully submitted that "Red" MacDonald's evidence indicates that the day he actually started work again after going home on the Saturday morning was on Sunday. MacDonald referred to the kleenex found by Mullowney as having sat around at the Park for a day or so (when in fact it may have been there as little as nine hours and at most twelve if we assume that it is connected to the stabbing). MacDonald associated the taking of the statement from Donald Marshall, Jr. with the next time he worked after going home on the Saturday morning. All of the rest of MacDonald's evidence is not verifiable as to date given the general nature of the activity conducted - although one may consider that it would have been reasonable for the Detectives to have returned to the scene from time to time after the search by the patrol officers had failed to turn up any weapon on the chance that they might see something missed by the searchers. Also, if "Red" MacDonald had been out on Saturday, why did he testify to this Commission that he

himself conducted no search but rather that one had been done.

121. On May 11, 1982, "Red" MacDonald gave a written statement to Staff Sergeant Harry Wheaton (Exhibit 99 - R. v. 34, pp. 95-96), in which MacDonald is reported to have said:

> My next shift [after being called out on the night of the stabbing] as I can recall was Sunday the 30th of May, 1971. I worked that shift with John MacIntyre nine to five. We checked around the park and after dinner we went to Louisburg. We went to Chants home in Louisburg and they told us their son Maynard was in Catalone and described the house.
>
> We went to Catalone and picked up Chant and John talked to him outside the car. Inside car there was no pressure put on Chant in my presence. There was very little talk. We returned to the station and John took over and that was the only dealings I had with Chant.

While "Red" MacDonald's statement to Staff Sergeant Harry Wheaton does not give a complete account of MacDonald's activity in relation to the Seale murder investigation, it does give this independent confirmation that makes it reasonable for this Commission to conclude "Red" MacDonald did not come back out to work after three and a half hours sleep on Saturday, May 29, 1971, and then work through until dinner time that day. MacDonald testified to this Commission that he was not scheduled to work Saturday, and his statement Staff Sergeant Harry Wheaton in 1982 is that he did not in fact work Saturday after having gone home at 4:00 a.m.

122. It is respectfully submitted that it is open to this Commission to decide "Red" MacDonald did not in fact come

out to work on Saturday, May 29, 1971, but rather left the investigation for John MacIntyre to take over. It was MacIntyre's "place to take over the investigation" (T. v. 10, p. 1671). No suggestion is being made that "Red" MacDonald should not have been out, but we respectfully submit that it is not possible to conclude that he was. Of course, if "Red" MacDonald had not been out on the Saturday with John MacIntyre, he would not have been able to show John MacIntyre his notes (Exhibit 38). "Red" MacDonald never actually states that he showed MacIntyre his notes anyway. Therefore, John MacIntyre would not have been in any position to be informed of any difference in the description from what appeared in the written reports at the Police Station. That is why there may have been no change in any direction about what the patrols were to look for in the way of alleged assailants.

123. A final point to consider on whether it is reasonable to believe whether or not John MacIntyre ever saw "Red" M.R. MacDonald's notes is that those notes never formed part of the Sydney City Police file. When John MacIntyre prepared an inventory of materials to turn over to the R.C.M.P. in 1982 (Exhibit 88) those notes were not included even though material in the possession of other police officers such as William Urquhart's Dan Paul note was. "Red" MacDonald was still an active police officer in 1982. The argument that John MacIntyre knew about Exhibit 38 in 1971 would have been stronger if there was some reference in Exhibit 88, but there is not.

124. It is respectfully submitted that John MacIntyre's position that he did not know about the notes at any time is not only correct but reasonable. In the intervening day MacIntyre would have been talking with Donald Marshall, Jr. when "Red" M.R. MacDonald was not there. Even "Red" MacDonald who says he was there feels that MacIntyre and Marshall spoke that day without "Red" MacDonald being involved. There is no evidence as to what Marshall may have said on the Saturday to John MacIntyre, but in "Red" MacDonald's mind it may well have made the disclosure of his notes redundant.

Specific Directions by John MacIntyre

125. Although some of the patrol men testified to this Commission that no special directions were received from the Detectives in this investigation, it appears that their recollection may be faulty. Leo Mroz, Richard Walsh's partner on the night of the stabbing, gave a statement to the R.C.M.P. on May 19, 1982 recalling that":

> I remembered a description of two priestly looking men in a white VW with foreign plates being passed to us. We checked many vehicles that night (Exhibit 99 - R. v. 34, p. 99).

126. This "priestly looking" description was first given Sunday by Marshall to MacIntyre (Exhibit 16 - R. v. 16, p. 17), and by Marshall to Walsh and McDonald (e.g., T. v. 8, p. 1420). That must therefore have been communicated to patrol officers such as Mroz on the direction of MacIntyre.

127. The description of a white Volkswagen did not come

from either John MacIntyre or "Red" MacDonald. The only officers having contact with Donald Marshall, Jr. on the night of the stabbing would have been Howard Dean or his partner of that time - Martin MacDonald, now deceased. If Mroz was looking for two priestly looking men in a white Volkswagen with foreign plates on the night of the stabbing, Richard Walsh must have been looking for the same thing - even though he does not now remember. Of course, the possibility exists that Mroz is mistaken about which night he began looking for the white Volkswagen. He and Walsh, Dean and Martin MacDonald would all have been commencing work again at midnight Saturday until 8:00 a.m. Sunday. The most that can be taken from Mroz's statement is that at some point he became aware of a white Volkswagen with foreign plates which he ought to look for in connection with the stabbing and, if possible, two priestly looking men.

128. Oscar Seale testified before this Commission about a car being involved in the stabbing (T. v. 29, p. 5361). What Seale was told by Donald Marshall, Jr. was that Marshall and Sandy:

> ...were in the park...and they were talking and two - two men pulled up in a car.

Oscar Seale could not recall whether it was a white car with Manitoba license plates or a blue car with white Manitoba license plates. Marshall continued:

> And they [the two men in the car] asked him and my son if they had any cigarettes and matches and they said, "No". He said that he then said that

> this man took out a knife and says, "I don't like Niggers", and stabbed Sandy in the stomach. He then took the knife and said, "I don't like Indians", and made a slash at him. (T. v. 29, p. 5361).

Seale asked Marshall:

> About this car, are you sure it was Manitoba license plates?

and Marshall said yes. Marshall said that the two men got in the car and drove away (T. v. 19, p. 5362).

129. Oscar Seale spoke with the R.C.M.P. who referred Oscar Seale to the Sydney Police, although after some persistance by Mr. Seale did agree to "see what we can do" (T. v. 19, pp. 5363-5364). All this occurred prior to 8:30 a.m. on May 29, 1971. As counsel for Donald Marshall, Jr. brought out in evidence, Oscar Seale was unaware until the time of testifying before this Commission that John Pratico had given a statement on May 30, 1971 referring to a "white Volkswagen, blue license and white number on it" (T. v. 29, pp. 5407-5408; Exhibit 16 - R. v. 16, p. 22).

130. There is no evidence that Oscar Seale communicated the point about the white or blue Volkswagen to John MacIntyre at any time in 1971. As highlighted by counsel for Donald Marshall, Jr. in Oscar Seale's evidence, John Pratico did give a statement to the Sydney City Police on Sunday, May 30, 1971 which referred to two men running from the direction of screams in the area of Crescent Street, jumping into a white Volkswagen, with blue license and white lettering on the license (Exhibit 16 - R. v 16, p. 22). This was the third or perhaps fourth statement which

John MacIntyre took on Sunday, May 30, 1971, and, if true, suggested that the perpetrators of the crime who had been strangers to Donald Marshall, Jr. (Exhibit 16 - R. v. 16, p. 17) were not local. Since there was at least the suggestion that the assailants were not local, it is reasonable to believe the likelihood of identifying the assailants positively through local witnesses would not be as strong as finding a vehicle with out of province plates.

131. It is respectfully submitted that the white Volkswagen theory cannot be discarded lightly. Another witness, Rudy Poirier ultimately gave a statment on July 2, 1971 which, like the testimony of Oscar Seale, reported Donald Marshall, Jr. associating the two men with a white Volkswagen the day after the stabbing (Exhibit 16 - R. v. 16, p. 95).

132. On Saturday, May 29, 1971, R.C.M.P. Officer David Murray Wood testified that the only information he could get from the Sydney City Police was a minimal description of a man forty-five or fifty years of age with grey hair (T. v. 10, p. 1821). On Monday, May 31, 1971, the day after the first statement was taken from John Pratico, David Murray Wood has a note (Exhibit 40) indicating interest between 9:00 a.m. and 11:00 a.m. in a:

> ...Light blue Volkswagen parked on Pitt Street near Chic'N'Coop Restaurant New York license: 9993-OR, noticed grey haired man with grey beard, thirty-five to forty years standing of Maple Leaf Restaurant, appeared to be a stranger. Later observed a man thirty-three to thirty-eight years, brown hair, receding hairline, wearing a brown T-shirt, driving above-noted Volkswagen, Sydney

> Shopping Centre...drove out Prince Street towards K-Mart, Sydney City Police advised.

Wood could not say where he got the indication to be on the look out for this light coloured Volkswagen, nor could he advise who would have been advised at the Sydney City Police (T. v. 10, pp. 1809, 1839). Considering Pratico's first statement (Exhibit 16, p. 22), Wood testified that he could think of no other reason why he would be looking for the Volkswagen and reporting to the Sydney Police except that a request to be on the look out for such a Volkswagen had come from the Sydney City Police (T. v. 10, pp. 1839-1840).

133. Joseph Terrance Ryan was Murray Wood's partner in 1971. His notes (Exhibit 41) identify the same light blue Volkswagen on Pitt Street on May 31, 1971 as had been identified by Wood (T. v. 11, p. 1858). However, Ryan's notes for that Monday continue, indicating that:

> May 31, 1971: 8:30 a.m. until 5 p.m. Patrolled locally by H.04-37 [police car no.] re: assistance City Police re: murder. Attempt to locate a white Volkswagen, possibly Ontario registration (Exhibit 40).

Ryan was unable to say whether the assistance in searching for the light coloured Volkswagen was the result of a request to him from the Sydney City Police, or as a result of information coming from a third source through his partner Murray Wood (T. v. 11, p. 1860).

134. It appears obvious from the notes of the R.C.M.P. officers that the Volkswagen theory was a real lead being pursued

early in the week following the stabbing of Sandy Seale. It is respectfully submitted that this Commission should conclude that the source for this interest was the Sydney City Police and particularly John MacIntyre who was directing the investigation at that time. This submission was made on the following reliable and reasonable grounds. It would be unlikely that the R.C.M.P. would take direction from some third party to look for a white Volkswagen for the purpose of reporting it to the Sydney City Police, particularly if, as some alleged, the Sydney City Police had already decided that Donald Marshall, Jr. was responsible for the stabbing. If Marshall was responsible for the stabbing, the white Volkswagen would have been an unnecessary and time-consuming diversion. Also, if the white Volkswagen theory was only something which Oscar Seale and the R.C.M.P. officers were interested in, Constable Leo Mroz would not have been told to look for it at any time.

135. There is no evidence to justify any inference that the Sydney City Police were aware of a white Volkswagen as early as the night of the stabbing as Leo Mroz's statement would suggest. Indeed, if the Sydney City Police had been aware, it is likely that that is the kind of information which would have been conveyed to Murray Wood on the Saturday morning in addition to the other information which Murray Wood obviously received (Exhibit 40; T. v. 10, pp. 1802-1803, 1825), and it would likely have appeared in the Crime or Occurrence Reports (e.g., Exhibit 16 - R. v. 16, pp. 11-16). Murray Wood and Joseph Terrance Ryan

were both looking for a light coloured Volkswagen from first thing in the morning the day after John Pratico's 6:00 p.m. statement. It is respectfully submitted that that is where the information came from and the Sydney City Police were quite properly pursuing that lead.

Conclusion

136. It is respectfully submitted that the evidence about the white Volkswagen indicates that the criticisms of John MacIntyre for not actively consulting with his patrol officers in the early days of this murder investigation are unfounded. In the absence of notes about informal consultation as described by Richard Walsh, Ambrose MacDonald, and Edward MacNeil, it is not surprising that after more than sixteen years these officers do not recall every piece of advise or direction which may have been received from the Detective Department directly or through the Desk Sergeant. Ambrose MacDonald did keep notes and has notes of informal consultations with the Detective Department.

137. The white Volkswagen lead was communicated. By the time the white Volkswagen lead was brought to the attention of the Police, the Detectives also had Marshall's formal statement fixing the description of his alleged assailants. Leo Mroz's statement to the R.C.M.P. in 1982 is interesting here as well because his language follows that of Marshall's May 30, 1971 statement comparing the appearance of the assailants with priests. Despite the absence of complete documentation on this point, we respectfully submit that this Commission should find

that there was in fact regular and sufficient consultation between the Detective Department and the patrol shifts.

138. There is no proven failure to consult. Even if there was, it is evident from the knowledge or lack of knowledge of Roy Ebsary among the police officers who testified before this Commission that consultation would not have identified Roy Ebsary or Jimmy MacNeil as potentially involved in this kind of crime. Those who perhaps ought to have memories of Roy Ebsary were not prompted sufficiently by the circumstances of the crime to recall or associate it with Roy Ebsary (Section D supra). John MacIntyre can scarcely be faulted for the fact that others may have had useful information in the recesses of their mind which they did not disclose to John MacIntyre.

F. Failure to Review Criminal Files to Determine Suspects with a Modus Operandi of a Knife

139. It is clear from documentation filed with this Commission that the Sydney City Police had had contact with Roy Ebsary in April, 1970 in relation to a weapons offence under the Criminal Code - specifically a twelve inch butcher knife (Exhibit 16 - R. v. 16, p. 1). It is also known that on that same date Roy Ebsary was fingerprinted by Detective William Urquhart (Exhibit 121). It appears from this documentation that Roy Ebsary appeared in Court on April 9, 1970 and pleaded guilty to possessing the concealed knife and being drunk in a public place, being fined with respect to both charges. It is also known that a Police Record Card indicating the April 8, 1970 matters as well as other liquor and criminal matters in February, 1958, and May, 1970 existed (Exhibit 18 - R. v. 18, p. 34).

The Form in Which Records are Kept

140. This Commission heard evidence from Howard Dean who, at the time of the hearings, was in charge of records for the Sydney City Police, and had been in charge since 1983. There was also evidence given at the Commission Hearings that Constable LeMoine was actually in charge of the records section in the Sydney Police Department (T. v. 9, p. 1591) but LeMoine was not called. Dean personally had no knowledge as to the manner in which records were kept in 1971 (T. v. 9, pp. 1498-1499). However, it is a reasonable assumption that any ability to use the record system in 1987 would not have been less productive

than any system which was in place in 1971. Therefore, if the system in 1987 could not be easily used to provide certain information, it would not have been possible to use the records in 1971 in that way either.

141. According to Howard Dean, offence records were filed by name (T. v. 9, p. 1499). There was no filing system by type of weapon, or by description (e.g., an older man). Occurrence and crime report records were filed in the records section in the same way - by name (T. v. 9, p. 1501). Howard Dean concluded for this Commission that in order to use the records of the Sydney Police to find an unnamed older man with a knife, "we would have to go right through all the reports to see if there was anything on it for that". Over a few years significant amounts of records would have accumulated, and indeed Howard Dean had never been requested to simply go through all the records in the hopes of matching up an individual with a description of the person and the offence (T. v. 9, pp. 1500-1502).

142. Other officers testified about the Sydney City Police records in 1971. Richard Walsh went so far as to say that there was no set record section and filing was achieved by taking all reports at year end, tying them up and putting them in a cardboard box which was placed somewhere "until some day they might be needed or surfaced" (T. v. 7, pp. 1285-1286). Edward MacNeil testified about the existence of a hard-cover book of criminal charges with disposition in addition to the other

records created by the Department's contact with an individual (T. v. 15, pp. 2612-2613).

143. Edward MacNeil expressed the opinion that the Sydney Police Department's system of record-keeping would not allow for review about the activities of unknown persons except through something triggering the memory of the officers who may have originally been involved with the unknown person (T. v. 15, pp. 2613-2614). This appears to be a reliable opinion. Nothing triggered in Edward MacNeil's mind about Roy Ebsary in 1971 (T. v. 15, p. 2623). William Urquhart's recollection was not triggered (T. v. 54, pp. 9833). "Red" MacDonald's recollection was not triggered (See Section G, infra). This Commission does not have the evidence of Fred LeMoine who was the other officer whose recollection may have been "triggered". While there is some evidence that John MacIntyre could have seen the MacNeil and LeMoine report, and that MacIntyre had an excellent memory, (T. v. 8, pp. 1392-1393), there is nothing to suggest that his recollection was triggered or indeed that he had any recollection.

The Alleged Failure

144. Whether or not anyone was in charge of records in 1971, John MacIntyre certainly was not. It is respectfully submitted that the evidence is clear that the Sydney City Police records were effectively useless in the case of an unidentified suspect. Indeed, the records, being based on name rather than conduct, or name cross-referenced with conduct, were no better

than the memory of individual police officers. In the absence of some memory being of assistance in supplying a name which could then be researched, the records could provide nothing. 145.Unfort unately, there was no testimony which actually quantified the amount of work which would have been entailed for the Sydney City Police to review all of their criminal files to determine whether any might be suspects given a modus operandi of a knife. Only knowing how much work would be involved would permit a judgment as to reasonableness in not doing such a search. Therefore, it is respectfully suggested that it cannot reasonably be suggested, without some more evidence, that the failure to identify Ebsary as a possible suspect through criminal records should be described as a failure by John MacIntyre. Instead, it is respectfully suggested that the evidence as to the condition of records at the Sydney City Police Department should be the subject of some consideration and recommendation by this Commission which could make the system more useful.

M.C.I.S.

146. An R.C.M.P. telex dated Sunday, May 30, 1971, and forwarded from Sydney to Halifax at 3:11 a.m., remains a document of entirely unknown authorship (Exhibit 16 - R. v. 16, p. 90), as is a follow-up telex sent June 5, 1971 at 12:56 p.m. (Exhibit 16 - R. v. 16, p. 91). After giving some background about the case and a description of the alleged assailant, this document seeks a records check "for person(s) in Sydney met area using similar type MO with photos etc".

147. Evidence given by R.C.M.P. Officers at the Commission Hearings indicated that the R.C.M.P. had available to them, and on request for municipal forces, the "Maritime Crime Index Section" (M.C.I.S.) whose purpose was to corrolate information on various criminals and criminal activity throughout the region. This would permit the determination of suspects for current crime by looking at the method of operation in comparison with similar incidents in the past (T. v. 11, pp. 1867-1868). The R.C.M.P. Officers were unsure whether Sydney City Police information would have been fed into the M.C.I.S. system (T. v. 11, pp. 1868-1869, 1882; T. v. 10, p. 1844). The so-called "C.P.I.C." system was not in place in 1971 (T. v. 9, pp. 1503-1504).

148. In addition, the R.C.M.P. in 1971 would have had an index card system for recently released criminals, individuals on parole, outstanding warrants, and that kind of thing, maintained on a local basis (T. v. 11, pp. 1882-1883). These latter records would not have included occurrences or prosecutions handled by the City of Sydney Police (T. v. 11, p. 1883).

149. The only indication that the M.C.I.S. search had any success was that David Murray Wood testified that if such a search was successful, photographs and any other information would have been forwarded to the N.C.O. of the Sydney Detachment, as the exhibit itself requests. Wood himself has a note (Exhibit 40) indicating that on June 3, 1971, he provided a photograph to the Sydney City Police, and this could have been a photograph

which was made available as a result of the M.C.I.S. search (T. v. 10, p. 1852). For their part, the Sydney City Police apparently took three "mug-shots" of white men to show Sandy MacNeil within a few days of May 31, 1971, but none were the man whom MacNeil had seen in the area of Wentworth Park on the night of May 28, 1971 (T. v. 11, pp. 1924-1926, 1929-1930). For his part, George Wallace MacNeil was unable to recall being contacted about photographs (T. v. 11, pp. 1942-1943). If no reply had been received from M.C.I.S. it should have been followed up (T. v. 28, pp. 5283-5284), but these would have been internal R.C.M.P. communications and nothing in the possession of this Commission points conclusively to whether a reply was or was not received. From Wood's evidence about the photograph it would appear that the probability is that a reply was received.

Conclusion on Records

150. It is respectfully submitted that when one considers the evidence with respect to each of the potential sources of information - Sydney City Police records and R.C.M.P. records - no criticism of John MacIntyre in relation to those records can be maintained. The Sydney Police records were not useful because they were not indexed in a way which would be of assistance until the Sydney City Police had a name. There seems to be a probability that the M.C.I.S. search was helpful in a limited way, but whether the name and method of operation of Roy Ebsary was even in the M.C.I.S. system remains entirely unknown. There is certainly nothing to connect the lack of

success in finding Roy Ebsary with the criminal record systems of either the Sydney City Police or the R.C.M.P. to John MacIntyre. No one has ever suggested that James MacNeil could have been discovered this way. None of this has any possible connection with John MacIntyre. Any suggestion of failure on John MacIntyre's part because of the lack of usefulness of the records is, we submit, unsupported and therefore unjustified.

G. Failure to Discover Roy Newman Ebsary or James William MacNeil

Means of Discovering Ebsary or MacNeil

151. Although subject to some variation in important details from time to time, Donald Marshall, Jr. consistently related to the Sydney City Police and others that he and Seale had been set upon by two men on Crescent Street as a result of which Seale was fatally stabbed and Marshall was slashed on the arm. Marshall indicated to the Police that the assailants were unknown strangers, and at least by Sunday, May 30, 1971, had advised the Sydney City Police that the assailants had said that they came from Manitoba (Exhibit 16 - R. v. 16, p. 17).

152. On the strength of what Donald Marshall, Jr. had told the Sydney City Police, indications were that the assailants might not be known offenders in the Sydney area. Indeed, throughout the investigation none of the witnesses who had seen or claimed to have seen the people answering the description of either Ebsary or MacNeil suggested that these individuals were local people (e.g., Exhibt 16 - R. v. 16, pp. 22, 26). In this kind of situation it would be reasonable for the local police force to seek assistance from the R.C.M.P. which had broader information sources, through such vehicles as the Maritime Crime Index Section. At the same time, even though the assailants described themselves as having come from away, the possibility certainly existed that the assailants were in fact unidentified locals. There would have been sufficient cause however, from the description of events given by Donald Marshall, Jr., that the

M.C.I.S. should be employed for any assistance which it could give.

153. A parallel source of discovering whom the assailants might be would have been through local Sydney City Police records, particularly if the inference were taken that Seale's assailants had not been honest in saying that they were from out of province, or indeed out of the Sydney Metropolitan area. With hindsight this Commission knows that the Sydney City Police had fingerprint records and charge records in relation to Roy Newman Ebsary (Exhibit 16 - R. v. 16, p. 1; Exhibit 18 - R. v. 18, p. 34; and Exhibit 121). This Commission knows that James William MacNeil neither at that time in 1971 nor since had any criminal record or official contact with the Sydney City Police (T. v. 2, pp. 458-459) other than that which his brother initiated on November 15, 1971. In any event, it would be reasonable to consider local Sydney City Police records as an avenue by means of which Roy Ebsary's name could have come to the attention of the Sydney City Police - whether or not this avenue would be practicable, with which we will deal in a moment.

154. A third avenue through which Roy Ebsary and Jimmy MacNeil could have been identified and considered in relation to this matter would have been through some personal suspicion or idea raised in the mind of a police officer - Detective or Constable. This would not only include identification of Ebsary or MacNeil through some recollection of official police contact with either of them, but would also include a police officer

sifting through his general store of knowledge gained as a result of regularly patrolling the City and dealing with its various citizens. While this means of identifying Ebsary and MacNeil would not be scientific like some computerized criminal record retrieval system, it would have been an important and valuable avenue to pursue in 1971, whether or not it was successful in coming up with Ebsary and MacNeil's names.

155. The fourth potential source of information which could have lead to the discovery of James William MacNeil and Roy Newman Ebsary would have been advice to the Police by some third party. The effectiveness of this means of discovering suspects would require of course, three steps. First, the third parties would have to be aware of the person. Second, the third person would have to know that the Police were looking for such a person. Once the third person had made a connection between what he or she knew and what he or she knew the Police were seeking, the third person would have to make the decision to communicate whatever information they had to the Police so that the possible lead could be pursued. This is not a system or means of discovering witnesses or offenders which is in anyway controllable by the Police, but it is a means by which some discoveries could be made if citizens co-operate. The police could only affect the second factor: letting the public know what they were looking for.

156. A further means of identifying unidentified suspects is through information which can be gathered from real

evidence - such as hair, fibre, finger print, and other sceintific analyses. However, this first requires that the real evidence exists and then requires that the real evidence is capable of producing from scientific analysis some identifiable characteristic. There is then a requirement that the characteristic discovered from the real evidence, such as a fingerprint, means something in relation to other information or data accessible by the Police. For example, it is not much use to have a fingerprint if there is no effective means of comparing it with any fingerprints which may be available. There has to be a known identifying characteristic associable with a particular individual to give meaning to the characteristic which is discovered to be connected with the crime.

157. The final means for discovering who Ebsary and MacNeil were, would have been the means which eventually resulted in the discovery of Ebsary and MacNeil in 1971: admission or confession by one of the individuals for whom the Police had been looking. In the event that no one else can come up with any suggestion as to whom the Police should be looking for, this means of discovering unidentified suspects very quickly becomes the only means to produce results, reliable or not. In any event, this means of discovering offenders who cannot be identified by the victim or by other means, is entirely within the control of the unidentified suspect and his or her companions.

The Avenues Followed:

M.C.I.S.

158. -- No information came forth on Saturday, May 29, 1971, which would have suggested that the assailants described by Marshall and Seale had been local people - as nothing to that effect came forward until November 15, 1971. Donald Marshall, Jr. was around the Police Station on Saturday at the request of John MacIntyre (Exhibit 1 - R. v. 1, pp. 70-74) for the purpose of providing information. No formal statement was taken from Donald Marshall, Jr. until Sunday afternoon, but it is scarcely conceivable that John MacIntyre and Donald Marshall, Jr. would have had discussions about the stabbing without some recounting of events in line with the statement which he eventually gave (Exhibit 16 - R. v. 16, p. 17). Although there is no reason to believe that the "white volkswagen" information had surfaced at that time, the "Manitoba" remark very easily could have and the fact that Marshall did not know them, indicating a possible non-local offender.

159. At 3:11 a.m. a telex was sent to the Maritime Crime Index Section at "H" division in Halifax from the Sydney Detachment of the R.C.M.P. (Exhibit 16 - R. v. 16, p. 90). The telex indicates one time of 3:11 a.m. on Sunday, May 30, 1971 and a handwritten notation on the document indicates that it could have been handled by the Criminal Investigations Branch the next morning, May 31, 1971. The telex itself identifies both known persons involved, one of whom had died. The telex does identify Donald Marshall, Jr. as "possibly the person responsible" no

doubt based on the fact that he was, at that point, the only other known person involved. Then the telex recounts a version of events which is attributed to Donald Marshall, Jr.:

> Marshall states he and deceased were assaulted by an unknown male approx. 5'8 to 6' tall, grey haired approx. 50 yrs. who stated he did not like Indians or Negroes and assaulted both persons with a large knife.

This is a different and more complete description than had been available to John MacIntyre to give to David Murray Wood earlier on May 29, 1971 (Exhibit 40). There is no evidence of Donald Marshall, Jr. speaking to anyone else other than John MacIntyre on the Saturday. However, any "Manitoba" connection is not mentioned.

160. John MacIntyre appears to have been the only responsible officer who spoke with Donald Marshall, Jr. on Saturday, May 29, 1971 during the day, and so may well have provided all or part of the information which appears in the telex. However, the telex itself is an internal R.C.M.P. document (T. v. 10, p. 1817) and the wording chosen for it and the details contained in it cannot be ascribed to John MacIntyre. It would also have been appropriate to seek a check for persons in the Sydney metropolitan area given the time when the request was being made because the "Manitoba" reference may well have been false - as indeed it was.

161. The telex does request that the records be checked:

> ...for a person(s) in Sydney met area using similar type MO with photos etc....(Exhibit 16, R. v. 16, p. 90).

David Murray Wood testified to this Commission that each R.C.M.P. Detachment kept its own local records (T. v. 11, p. 1883) which would normally have to be checked. If this telex was purely some internal R.C.M.P. initiative in Sydney, no special request for a records check for the Sydney metropolitan area would have been necessary because the Sydney R.C.M.P. would have had that information in their own records. It is respectfully submitted that the logical inference to take from the M.C.I.S. request is that that section of the R.C.M.P. check its records not only for the Maritimes, but when forwarding information to include information which M.C.I.S. might otherwise assume that the Sydney Detachment had - because, as the telex indicates:

> Circumstances presently being investigated by Sydney PD (Exhibit 16 - R. v. 16, p. 90)

162. The records of M.C.I.S. were set up in such a way that an "MO" search could be done. Such a search would not be geographically limited. It is respectfully submitted that special mention of the Sydney metropolitan area would not necessarily be restrictive. In the request to M.C.I.S. it would be implicit that information from the whole maritime region was being sought.

163. The M.C.I.S. request may or may not have been successful in turning up any suspects (Compare Exhibit 40; T. v. 10, p. 1852). No witness could tell this Commission that Roy Ebsary's criminal record with the Sydney City Police Department was also in the M.C.I.S. system. However, the M.C.I.S. request

was a reasonable potential source of information to pursue. It is respectfully submitted that the evidence before this Commission leads to an inference that John MacIntyre participated to some extent in ensuring that that avenue was pursued.

Local Sydney City Police Records

164. Elsewhere in this submission we have dealt at length with the Sydney City Police records (Section F, infra). It is sufficient to state here that without the name of any alleged offender, the records of the Sydney City Police were virutally inaccessible because they were, and still are, filed by name only. While in an objective sense one might have expected a thorough review of the Sydney City Police records in an attempt to come up with a name, in fact it was not a practicable response at the time. There is little or no evidence as to what kind of effort would have been required to actually unearth either the Roy Ebsary occurrence report (Exhibit 16 - R. v. 16, p. 1), or his criminal record (Exhibit 18 - R. v. 18, p. 34), or his fingerprint records (Exhibit 121). John MacIntyre very directly, and we suggest honestly, acknowledged to this Commission, that he did not believe any general review of the records was carried out (T. v. 32, p. 5947). There was nothing in the context that demonstrates this as a failure by John MacIntyre given that the alternative would not have been reasonable.

165. The organization of the criminal records of the Sydney City Police were only as good as the memory of a name by police officers using it, a name which could be associated with a

description or a particular type of event. In 1971, none of that would have been under John MacIntyre's control. It is respectfully submitted that this avenue for discovering Marshall's assailant was effectively denied to John MacIntyre. It is not justifiable to consider any criticism of John MacIntyre for not discovering Roy Ebsary through the Sydney City Police records.

Police Officer Memory

166. It is in the nature of the work of police officers that they regularly come into contact with various members of the public, law-abiding and otherwise. As a result, it is resonable to expect police officers when confronted with a crime by an unidentified individual to attempt to associate any information about the crime with their general knowledge of different people and the habits of different people. However, this avenue of identifying potential suspects requires that there first be knowledge of someone who might be a potential suspect, and then further requires that the police officer be able to recall and associate that knowledge with the crime at hand.

167. This Commission cannot go into the recesses of men's minds to determine if such attempted associations were made. The evidence before this Commission indicates that in the case of most of the police officers, the discovery of Roy Ebsary through recall would have been ineffective because they did not know him (See Section E, supra). John MacIntyre did not know Roy Ebsary (Exhibit 15 - R. v. 15, p. 10), and neither did

William Urquhart (T. v. 52, p. 9614). For these police officers, the fact that they did no know Roy Ebsary precluded this possible avenue of discovering who Ebsary was by recollection in the hours, days and weeks following the stabbing of Sandy Seale.

168. Some police officers would have had reason to know Roy Ebsary but did not recall who he was or associate him in their minds with the stabbing which had occurred: Edward MacNeil and Fred LeMoine (Exhibit 16 - R. v. 16, p. 1; T. v. 15, p. 2623), and this Commission only heard from the former (T. v. 15, pp. 2609-2612, 2613-2614, 2623-2624). William Urquhart did not recall Roy Ebsary either as a result of fingerprinting (Exhibit 121; T. v. 52, p. 9614). It was disclosed at these Commission Hearings that other police officers did have knowledge of Roy Ebsary to varying degrees, but none either associated him with this crime or knew his name. Certainly none of them testified about discussing a recollection with John MacIntyre that would have caused some change in the circumstances that could have at least eased the difficulty of uncovering Roy Ebsary. For example, if Ed MacNeil had indicated to the Detectives that he had dealt with an older man and a large knife within the last eighteen months, then an item by item search through the occurrence reports for the previous two years might have been reasonably contemplated.

169. Deputy Chief Norman MacAskill did not know Roy Ebsary by name although he recalled for this Commission that he had indeed seen the person he now knows as Roy Ebsary at a

shopping centre sometime before this incident in 1971 (T. v. 17, p. 3039). Lew Matheson, the Assistant Crown Prosecutor in 1971, related to this Commission that Norman MacAskill told him on the night of November 15, 1971, that he knew Mary Ebsary, and knew her well enough to describe her as the "anchor" of her household (T. v. 27, p. 5018). If indeed Norman MacAskill knew that Ebsary family well enough to understand the workings of the household, it may be inferred that he could have associated the man who was Mary Ebsary's husband with the name Ebsary. However, there is no evidence that Norman MacAskill ever communicated this thought to John MacIntyre or anyone else, if this Commission decides to accept the inference from the attributed remark.

170. Detective "Red" M. R. MacDonald testified that in 1969 or 1970 he had become aware of a report about a man with a gabardine coat walking around with a bunch of medals on his chest, up and down Charlotte Street (T. v. 10, p. 1667). Apparently this individual would tell people that he was in the Royal Navy (T. v. 10, p. 1668). However, as questioning by Commission Counsel pointed out, "Red" MacDonald did not know Roy Ebsary's name and there was nothing in the description given by Donald Marshall, Jr. that reminded "Red" MacDonald in any way of this character on Charlotte Street (T. v. 10, pp. 1667-1668). "Red" MacDonald indicated that his recollection was associated more with medals and the Navy than what he had to work with on May 29, 1971 (T. v. 10, p. 1668). "Red" MacDonald was not asked further about this.

171. Ambrose MacDonald testified that in May, 1971 he was not aware of a man by the name of Roy Newman Ebsary, and indeed never heard the name "until this incident", and then never associated the name with the person who actually was Roy Ebsary "until I saw him after 1982 or during 1982" (T. v. 7, p. 1167). MacDonald's reference to the time of "this incident" referred to late 1971 "when there was talk of Jimmy MacNeil and Roy Ebsary". Ambrose MacDonald in May, 1971 had seen the short order cook at the Esplanade Grill behind the counter but had never heard him speak nor heard him regale people with stories. MacDonald knew that this short order cook had worked in several restaurants and hotels, but does not recall ever having seen him on the street (T. v. 7, p. 1168). Indeed, MacDonald indicated that he was mislead by the initial description which had indicated a taller man with white hair and the tam or beret. MacDonald had associated this with:

> ...a very stately man who lived on the north end of the Esplanade. He was very tall and wore the Legion jacked with medals and the beret at times. I kept associating that as being Roy Ebsary, but because of his clean cut appearance and things I just couldn't imagine this man being involved in a crime and I find out since then I was...I was looking at the wrong guy all these years. (T. v. 7, pp. 1168-1669).

Thus, while Ambrose MacDonald did go through the natural process of association, that did not lead him to the short order cook at the Esplanade Grill. There is no evidence that Ambrose MacDonald ever conveyed the association he made between the description

given and another individual in Sydney to anyone.

172. Ambrose MacDonald did testify that the State Tavern which Ebsary was supposed to frequent was on Leo Mroz's beat (T. v. 7, p. 1166). This of course does not prove that Mroz knew who Roy Ebsary was either by description or name. Mroz is dead. This Commission does have a statement given by Leo Mroz to Corporal James Carroll on May 19, 1982 (Exhibit 99 - R. v. 34, pp. 98-99) but in it Mroz mentions nothing about having known Roy Ebsary in 1971 despite the fact that Roy Ebsary's name would have been very current in May, 1982.

173. It is respectfully submitted that while police officers may use their general fund of knowledge for the purpose of assessing descriptions of events and persons against their own knowledge of individuals in the community, this is a process which is individual to each police officer and not obviously reliable. Despite its weaknesses, this avenue of considered recollection provides a reasonable avenue for identifying potential suspects who are otherwise unidentified. It was an avenue which could not assist John MacIntyre in 1971 because the knowledge either wasn't there, or was too incomplete for the development of a useful association. That is not John MacIntyre's fault.

Information From Third Persons

174. A further potential source of information which could have lead to the discovery of James William MacNeil and Roy Newman Ebsary would have been advice to the Police by some

civilian witness discovered in the course of the investigation. Civilian witnesses must first obviously be identified to the Police either through other civilian witnesses (as Scott MacKay may have been discovered through Debbie MacPherson - T. v. 7, p. 1138), or by coming forward on their own. There is ample evidence that the Sydney City Police interviewed a number of people despite being hampered by the lack of a list of persons at the scene having been compiled at 12:15 a.m. on Saturday, May 29, 1971. Witnesses were interviewed not only for what they themselves saw in relation to the crime, but also with respect to other persons who might be pursued for other, and perhaps better, information (e.g., Exhibit 16 - R. v. 16, pp. 123-125, 127, 129-131, 133-143).

175. With particular reference to persons answering in some respect the descriptions given by Marshall, statements were taken from Maynard Chant and John Pratico on May 30, 1971 (Exhibit 16 - R. v. 16, pp. 18-23). Alanna Dixon was pressed about other people being seen in the Park (Exhibit 16 - R. v. 16, pp. 24-25) but came up with no one of a description similar to that given by Marshall. George Wallace MacNeil and Roderick Alexander MacNeil gave a joint statement on May 31, 1971 which was to be the closest description to Marshall's received in the course of the entire investigation (Exhibit 16 - R. v. 16, pp. 26-27). The only other witness interviewed prior to June 4, 1971 who asserted that she had been in the Wentworth Park and Crescent Street area at a time close to the stabbing, Debbie MacPherson,

could not give the police any assistance about seeing a man in what she recalls described as "a man with a trench coat" - even though John MacIntyre apparently pursued this point with her vigourously (T. v. 4, pp. 714-715, 719). Thus, it is respectfully submitted that it cannot be said that John MacIntyre did not make any efforts to pursue the description Marshall had given him with other witnesses who had spoken about being in the Wentworth Park/Crescent Street area at the time of the stabbing.

176. The Sydney City Police and John MacIntyre did not stop at word of mouth as to who might have been in the area of the stabbing. Given the absence of some reasonably definitive list compiled of who was in the area, it was necessary for the police to let the public know that it was looking for people who had information about two men alleged to have been in Park and who appeared to be connected with the stabbing. This Commission has in evidence that information was given to the newspaper, and the newspaper gave prominent coverage to the investigation (Exhibit 42). Other media were also used. George Wallace MacNeil testified that he took the initiative to come forward with the person who had been in his company on the Friday night after hearing an appeal for assistance on the radio or television (T. v. 11, pp. 1939-1940). George MacNeil was able to connect the plea to knowledge which he had, and then made the effort to come forward with that information to the Sydney City Police. This seems to have been a rare occurrance in this investigation but that is no fault of John MacIntyre's. The only means by

which witnesses can be identified where none appear to exist is to let the public know and this was done. The community itself must accept the responsibility for any lack of response, and therefore lack of success, in this area.

Real Evidence

177. A regular means of identifying unidentified suspects is through information which can be gathered from real evidence - in particular, fingerprints on weapons. As indicated above, the utility of this avenue for indentifying unidentified suspect requires that there be some real evidence such as a weapon or car keys which could yield the identifying information. In this case there were no such pieces of real evidence. That foreclosed this avenue of investigation (See also Sections B,C,and D, supra).

Admission or Confession

178. From time to time information will come into the possession of the police from an acutal participant in a crime. Obviously, this is the best kind of identifying information, leaving aside questions of cogency and reliability. In this particular case one of the participants in the event lost consciousness and died before anyone could obtain an indentification from him. The other individual known to be involved provided a description but in no case was he able to attach that description to a name or some specific individual about whom he knew (Exhibit 16 - R. v. 16, p. 17). Roy Ebsary was certainly taking no steps to come forward, and Mary Ebsary

did not really believe that her husband had been involved with the stabbing in the Park (Exhibit 16 - R. v. 16, p. 182; T. v. 24, pp. 4545-4547, 4551, 4557, 4560-4561).

179. The evidence before this Commission leads to this point. The only person capable of positively identifying Roy Ebsary as the assailant who killed Sandy Seale was James William MacNeil, the fourth person present at the event. As indicated above, Jimmy MacNeil was known by some of the police officers, but not as a result of being associated with any kind of criminal activity - let alone murder. There was no reason to pick Jimmy MacNeil's name out of the air and to go to see him.

180. It is acknowledged that Jimmy MacNeil has been bothered for a long time about not coming forward to the Police right away (T. v. 3, pp. 455-456). Jimmy MacNeil has testified that a number of factors were inhibiting him from coming forward between May and November, 1971. Whether or not it was intended this way, there is some evidence that Jimmy MacNeil understood his Wandlyn Motel meeting with Mary and Greg Ebsary as a threat of trouble if he reported Roy Ebsary's involvement in the Seale stabbing to the Police (Exhibit 16 - R. v. 16, p. 182; T. v. 3, pp. 451-453, 506-507, 620-622). Jimmy MacNeil had apparently also spoken with his father about the matter, and his father told him that it was a matter of self-defence so no more should be said about it (T. v. 3, pp. 449-450, 612). Finally, Jimmy MacNeil testified that he did not come forward because he did not believe that Donald Marshall, Jr. would ever be convicted (T. v.

3, p. 624).

181. It is respectfully submitted that this last reason was the operative reason because it suggests that if he did have fears that a conviction would be imposed he would have come forward - as he indeed did on November 15, 1971. MacNeil still needed to be persuaded by his brother John to report the matter in November, 1971 (Exhibit 16 - R. v. 16, p. 171). Regardless of whether Jimmy MacNeil's failure to come forward sooner is understandable, it was a matter entirely beyond the control of John MacIntyre.

Conclusion

182. John MacIntyre has been criticized for not being able to uncover Roy Ebsary after the stabbing in 1971. No police officer is omniscient. The only thing that a Detective is able to do in indentifying unidentified suspects is to pursue with diligence all reasonable avenues which might lead to the discovery and identification of the perpetrator of the crime. It is respectfully submitted that John MacIntyre used the resources that were available to him from a practical point of view in a diligent attempt to discover Roy Ebsary. He did not succeed. There is no evidence that John MacIntyre disregarded, ignored, or otherwise mishandled any of the reasonable avenues of investigation described above. We respectfully submit that this Commission should arrive this same conclusion and find that any inability to uncover Jimmy MacNeil or Roy Ebsary was not attributable to any default on the part of John MacIntyre.

H. Failure to Interview Young Persons in the Presence of a Parent or Other Responsible Adult

The Law

183. Although there are now, in 1988, explicit provisions in the Young Offenders Act, S.C. 1980-81-82 c. 110, s. 11 and 56, with respect to a young person who may be charged with an offence, there is little that is new with respect to taking witness statements from young persons. The standard with respect to statements of accused young persons prior to the Young Offenders Act was uneven and did not admit of any hard and fast rules. It is worthwhile reviewing the experience of the Courts with respect to the legal treatment of confessions from young persons because the standard for accused young persons before the Young Offenders Act can not be considered as any lower than for witnesses who were not accused.

184. In R. v. Jacques (1958), 29 C.R. 249 (Que. S.W. Ct.) a child of fourteen and a half was apprehended by the police, driven for some 135 miles in silence, deprived of his personal belongings, imprisoned behind double, locked doors with a barred window in a cell normally used for those detained on suspicion of murder, was under the constant watch of a permanent guard who could see him always, was not given one full meal during a detention of two days, had to use a toilet in the sight of his guard, was given no opportunity to see a relative, and until the statement began was spoken to by no one. As a result of these rather horrific facts, the Court suggested that the police should, at p. 268:

> (1) Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation;
>
> (2) Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
>
> (3) Carry out the questioning as soon as the child and his relative arrive at headquarters;
>
> (4) Ask the child, as soon as the caution is given, whether he understands it and if not, give him an explanation;
>
> (5) Detain the child, if there is not a possibility of proceeding according to (3) above, in a place designated by the competent authorities as a place for the detention of children.

Chief Justice McRuer approved the guidelines with respect to having a parent present in R. v. Yensen (1961), 130 C.C.C. 353 (Ont. H.C.).

185. The presence of parents at the taking of a statement from a child has remained an important consideration in determining the voluntariness of a statement from a suspected or accused young person: e.g., R. v. R. (No. 1) (1972), 9 C.C.C. (2d) 274 (Ont. Prov. Ct.). However, the presence of a parent or similar person was only one factor to be considered on the admissibility of a statement from an accused young person, and the absence of such a person would not necessarily vitiate that statement: e.g., R. v. M. (1975), 22 C.C.C. (2d) 344 (Ont. H.C.J.); R. v. A. (1975), 23 C.C.C. (2d) 537 (Alta. S.C., T.D.);

R. v. D.M. and J.P. (1980), 58 C.C.C. (2d) 373 (Ont. Prov Ct.).

186. -- It is respectfully submitted that the prevailing opinion even after the date of the events with which this Commission is concerned was as stated in R. v. Blais (1974), 19 C.C.C. (2d) 262, at p. 266 (Man. Q.B.) where it was pointed out that:

> The real protest argued for the accused goes to his interrogation and the taking of his statement without the presence of the parent. The law however does not debar interrogation of a juvenile save in the presence of a parent or other adult related by ties of blood or friendship. Circumstances, of course, may alter cases; and I would not for a moment say there may not be occasions where it would be fatal for the police to neglect or refuse to call the parent, or to invite the parent to visit or speak with the juvenile before or during the interrogation, or at least to attend during the interrogation, even if cautioned not to interfere. There may indeed be cases where it would be preferable, if not essential, for the police to so involve a parent; and of course my attention was drawn to the decisions in...Jacques...and...Yensen....
>
> The Jacques and Yensen cases are discussed at some length in the article "Confessions By Juveniles", written by a Family Court Judge and Magistrate, and appearing in the (Canadian) 5 Crim. L.Q. 459 (1962-63). In Jacques, the interrogation followed two days of detention in a barred cell ordinarily occupied by adults involved in major crimes, accompanied by other conditions of impropriety; in Yensen the accused youth was retarded. As the writer of the article concludes, it is questioned about whether the remarks by the very experienced trial Judges in those cases ought to be looked upon as principles of general application. Certainly, the

> circumstances here in no way reflect or even approximate what occurred in the two cases cited.
>
> Apart from those decisions, counsel cited no authority which would debar the interrogation of a juvenile until a parent is given opportunity to attend this interview. As always, the matter is one to be considered in light of all the circumstances, including the age and intelligence of the accused and, possibly, the circumstances and nature of the offence itself. The learned trial Judge, experienced in such matters, saw no special circumstances in this case, nor do I, such as would make it incumbent upon the officers to speak to the mother of the accused before they did.

187. In the article titled "Confessions By Juveniles" referred to in the above citation, Judge Fox referred to an unreported Ontario Juvenile Court decision heard in early 1962 by the title of Re R.M. The facts of that case involved a thirteen year old boy described by psychiatrists as being in the "bright normal" range, but charged with having murdered a seven year old girl. Following a long trial involving a voir dire concerning a statement given some eleven days after the girl was found dead, the boy was convicted of having committed a delinquency in the nature of manslaughter. Fox commented at p. 467, 5 Crim. L.Q.:

> In that case, no relative was present while the written statement was taken by the police. The boy did not ask to have one present. He said he wanted to tell the truth - the whole truth - and the evidence was that he felt relieved after making the statement. There was a very strong suggestion on the voir dire that he was not free to tell the truth on an earlier occasion when he was being questioned by the same police officers in the presence of his mother. On that

> occasion, the boy told his mother that he was not going to lie. When asked by defence counsel on the voir dire what he had meant by that statement, he stated quite frankly that his mother had warned him, following the discovery of the girl's body, that if the police should come and question him, he was to say that he had been home all day, which the mother well knew was not so. It was not until the boy found himself alone with the police officers, a week later, in the juvenile detention home, that he finally broke down and said that he would like to tell the truth - the whole truth - which, as far as was indicated at the trial, he did. The statement followed.

Considering this case in the context of some inflexible rule about having a parent present, Fox continued at pp. 468-469:

> One is driven to ask, in a case of this kind - in the very peculiar circumstances leading up to and surrounding the taking of the statment - if there was even a remote possibility that the police would have discovered the whole truth in the presence of these parents or either of them. And, after all, it is the duty of the police to do everything that they can, within the bounds of fairness, and according to the rules set down in the cases for the taking of such statements, to seek out the truth, wherever it may lie. In this case, it is submitted, the interests of all parties, the boy himself, the local community, and the cause of justice, were better served than had both parents, or either of them, been present when the boy told the "whole truth" to the police.
>
> This is not to suggest, however, that the police are not to exercise special care in the matter of questioning or eliciting statements from children who are suspected of having committed or being involved in the commission of a crime or offence.....
>
> Undoubtedly, there must be countless

> other cases like Re R.M. coming before our courts from day to day in which there are strong reasons for believing that it would not be for the good of the child or in the interest of the community, that a parent or other relative should be present while the child is being interrogated or is being invited to make a statement to a person in authority. In such cases, it is submitted, it would be perfectly proper for the investigating officer, in the absence of the parent, to conduct his interrogation and take a statement from the child provided he complied, as far as possible, with the Judge's Rules, and those additional rules which have developed in English and Canadian case law surrounding the taking of such statements.

188. With respect to young persons as witnesses the Courts historically held that there was a lower standard required in interviewing a child witness and eliciting a complaint or story from them. Obviously evidence elicited by threats would be inappropriate: R. v. Mullen, [1968] 1 C.C.C. 320, at p. 334 (B.C.C.A.). Also, it is improper to interfere with a young person with respect to the substance of the evidence they are giving once that young person has gone on the stand and commenced to give evidence: R. v. Singh (1979), 48 C.C.C. (2d) 434 (Man. C.A.). In that case a fifteen year old girl gave testimony for the Crown against her father on the charge of arson. After giving her evidence, she was taken to an interview room in the Police building and questioned by a police officer who pointed to some incriminating letters which her father had written and who told her that it was known that she had lied on the stand. The girl eventually went back on the stand and recanted her former

false testimony. The Manitoba Court of Appeal decided that such questioning did not disqualify the girl as a witness - though it would certainly affect the weight of her evidence. The Court also stated at p. 438:

> There was some suggestion that the course of action was proper having regard to the fact that the witness was being persuaded to tell the truth, rather than to give false evidence. In my opinion, improper interference with a witness is wrong whether the motive or result of that interference is to produce true testimony or false testimony....Where no improper means are used, it is material to consider whether it is sought to have a witness speak the truth or falsehood, but where improper means are used, it is immaterial what the motive is. The law must be assiduous in protecting witnesses from improper interference, especially during the course of the trial. Had counsel recalled Paramajit to ask for a ruling that she was adverse, the learned trial Judge could then have considered whether to have her further questioned. Such questioning would have taken place in the Court-room before the judge, not in the Public Safety Building in the presence of two police officers.

Although decided well after the situations under consideration by this Commission, it is acknowledged that everything said there would appropriately apply to the events in 1971. In considering the contact with a witness if no improper means are used and the motive is to have witnesses speak the truth, there can be no objection. Improper interference is, and always has been, nothing more than improper interference.

189. John Watson in his book The Child and the Magistrate, Jonathan Cape (London: 1965) at p. 74 comments this

way on interviewing and eliciting the truth from young persons:

> Anyone can talk to children. Too many people not excluding some magistrates, talk at them. An older boy or girl will usually respond to the invitation, "Tell us all about it" but with a young child it is more difficult, especially if he is nervous. A method of coaxing him to speak, which is sometimes effective, may be likened to a military manoeuvre. An attacking general seldom commences operations by a headlong assault on the enemy's centre. He is more likely to begin by cautious reconnaissance and a delicate probing of the enemy's flanks. The same applies with young children: an enveloping movement is more likely to succeed than a direct assault. "Why did you steal your father's watch?" is bad strategy. The enemy closes his ranks and you are rebuffed.
>
> How much wiser to begin on the flanks with a few simple questions about his home and surroundings. Has he any brothers and sisters? How old are they and what are their names? Where do they live? How does he usually spend his evenings and week-ends? None of these things may be very material; but the questions are factual, uncontroversial and reassuringly removed from the delicate question of his father's watch. The child answers them glibly, gets used to the sound of his own voice and gains a measure of self-confidence. Further questions, more material to the issue, may concern the amount of his weekly pocket money; how he spends it; what happens if it runs out; who his friends are; whether his dad approves of them; whether his friends have watches...As like as not the reason why he stole father's watch will become so plain that the direct question need not be asked.

190. Although the case is an old one, R. v. McGivney (1914), 22 C.C.C. 222 (B.C.C.A.) expresses the view that in some

circumstances it is highly appropriate to vigorously challenge a young person about what they are saying to ensure so far as possible that the truth is being received. Mr. Justice Martin stated at pp. 227-228 in relation to an alleged recent complaint that:

> That opportunity here was manifestly, at the latest, when her grandmother first challenged her attention by asking her who had hurt her, and her answer in effect was that no one had done so. Whatever could be said to excuse her silence before that time, nothing could excuse it thereafter. To admit evidence of that nature in such circumstances would, in my opinion, be more than dangerous. While one may be justified in making due allowance for the actions or conduct of young children, yet at the same time it must be remembered that their minds, often highly imaginative, are singularly open to suggestion and the limit should be placed on that allowance and indulgence when prejudice to the accused is likely to result from a further extension thereof. When a reasonable just opportunity is established in the case of a child, there is no more justification for departing therefrom than in the case of an adult.

Neither the Courts nor the police are required to blandly accept every word spoken by a young person and full challenge may be justified where circumstances demand an indication of whether the truth is being told or not.

The Practice in 1971

191. The practice with respect to taking statements from young persons in 1971 was the subject of comment by many witnesses, but at the same time many were not taking statements from young persons in 1971: e.g., Richard Walsh and Ambrose

McDonald. It is respectfully submitted that the most cogent evidence as to R.C.M.P. practice was given by Douglas James Wright. Wright testified that he did not recall the policy that was in place when he was doing actual police work but did recall that it certainly was not mandatory that an adult or parent had to be present when taking a statement from a juvenile. As far as his practice was concerned:

> I've had adults present interviewing juveniles, yes, and in particular if it was a more serious matter, hey. I'd have the parent present or one of the parents present.
>
> Q. But you don't consider it to be - and did not at that time, I mean, consider that to be a mandatory thing?
>
> A. No, I'm aware of in latter years, of course, force policy did change, but this would be long after I left the police field - the active police field itself. I don't know when that policy changed. I think the latter's 70's or '80, '81. (T. v. 28, pp. 5254-5255).

David Murray Wood testified to consistent effect with what Wright had stated:

> We would have one of the parents present at all times or a school teacher if it happened to be at school, and there likely would be two officers present (T. v. 10, p. 1816).

192. The Sydney City Police had no written policy in 1971 (T. v. 10, p. 1696), and it was "Red" MacDonald's evidence that with anyone under 16:

> Well, you have to see the parents of the boy first or the person...And if you want

> to take a statement from them, you'd have to have one of the parents, you know, with him. (T. v. 10, pp. 1695-1696).

William Urquhart was perhaps more realistic when he stated:

> We always tried to get the mother or the father or the guardian with the juvenile when a statement was taken. But sometimes they requested that they didn't want their parents involved.
>
> Q. You're saying it was your practice, then, that you would make some attempt to have a parent or a guardian with them?
>
> A. Yes, if at all possible.
>
> Q. I see. Was that a practice within the department itself, do you know, or was that just your practice?
>
> A. No, I would say it was a practice within the department. The only reason it would change is, as I said before, if the person involved didn't want, they'd come in and say, "Look, I'll tell you what's going on but I don't want my parents to be involved or I don't want anybody else to know about it." (T. v. 52, p. 9481).

No differentiation as between accused juveniles or suspected juveniles and witness juveniles was discussed. The differentiation question began to be asked of "Red" MacDonald but was not immediately answered and Commission counsel did not pursue it (T. v. 10, p. 1696).

193. John MacIntyre was very frank when asked about any rule that he followed with respect to having parents present:

> Q. Okay. Now what about when you're taking statements from juveniles; is there any different practice that you follow?

A. No, I don't think. Wait now. Again - Again if there was a parent there that wanted to sit in on it, no problem.

Q. Well would you always make certain that a parent was there?

A. No, I wouldn't say that....I always like to have a parent present if they're there and sometimes a parent or the juvenile - (We're talking about juveniles now?)

Q. Yes.

A. - probably wouldn't want them there....[and after being referred to "Red" MacDonald's evidence]...In 1971, I - I must say that I did talk to juveniles without their parents at times and I also said if a parent could be present that I liked for them to sit in and if they didn't sit in it was because they objected to it or the party objected to it....But I did take statements without - without parents sitting in. (T. v. 32, pp. 5850-5852).

Norman MacAskill took the same position (T. v. 17, pp. 3035-3037).

194. It is respectfully submitted that the practice indicated by Douglas Wright and John MacIntyre was consistent with the applicable law at the time in relation to accused persons. Indeed, it is unknown if any witness at this Commission distinguished between accused juveniles and those who were merely witnesses, but it appears that if there was no mandatory requirement for a parent to be present during the statement of an accused juvenile then there would certainly be no mandatory rule of parental presence for the statement of a young person who was

merely a witness. While this Commission may wish to consider the validity of that position today, that cannot change the context of the legal and operational framework under which the Sydney City Police were operating in 1971.

Interviews With Young Persons in This Case

195. Barbara Floyd was interviewed by John MacIntyre and John Mullowney on Saturday, May 29, 1971 in the presence of her parents. The police told her parents to make sure that Barbara was telling the truth "and stuff like that", which her parents did (T. v. 18, p. 3131). In the course of the investigation of the Sandy Seale stabbing John MacIntyre also interviewed Joan Clemens in the presence of her mother Emily and her husband, Joan's father (T. v. 19, p. 3499). MacIntyre:

> ...had what you call a voice of authority and that he was in charge and we were there to answer his questions as he asked them. (T. v. 19, pp. 3499-3500).

Debbie MacPherson (Timmins) was interviewed on Thursday, June 3, 1971 in the presence of her brother Steven and Uncle Allan MacPherson for the entire interview of about an hour or an hour and a half (T. v. 4, pp. 714, 721, 727). The evidence from MacPherson is that when MacPherson's brother told the police present to stop asking questions, they did (T. v. 4, p. 715).

Pratico

196. With respect to John Pratico, he was sixteen and a half years old in May, 1971 (T. v. 10, p. 1997). Arguably the law permitted him to be treated as an adult, as he was by the Court system (Exhibit 1 - R. v. 1, pp. 42, see 155; T. v. 28, pp.

5227-5228). Adults are treated as adult whatever the mental difficulties: R. v. Helpard (1979), 49 C.C.C. (2nd) 35 (N.S.S.C., A.D.). In any event, John Pratico first received an indication that the police wanted to speak with him through his mother (T. v. 12, p. 2039). Pratico did not ask the police whether or not his mother could go to the Police Station with him, and gave evidence both that she did go with him that first day and she did not go with him that first day (T. v. 12, pp. 2040-2041, 2207-2208). Pratico's mother certainly did come to the Police Station that day, and John Pratico's evidence was that his understanding was that the police had told his mother that she should come to the police station when she was ready (T. v. 12, pp. 2040-2041, 2112). John Pratico's mother did not sit in while he was being questioned, and is unsure whether she was at the station to take him home (T. v. 12, pp. 2054-2055). It will also be recalled that Pratico's first statement followed a period of time sitting on a bench at the Police Station with Maynard Chant (T. v. 12, pp. 2016, 2043, 2044).

197. With respect to John Pratico's statement on June 4, 1971, Pratico says that his mother did not go with him to the Police Station, and he is unsure whether she showed up later or not because his mother was at the Police Station on a few occasions (T. v. 12, pp. 2061-2062, 2112). However, in John Pratico's February 25, 1982 statement to James Carroll of the R.C.M.P., John Pratico had indicated with respect to the second statement that:

> A couple of days later the police came, I wasn't home, my mother took me to the Sydney Police Station around one or two o'clock I think. I talked MACINTYRE alone at first, MACDONALD came in a few minutes later. I sent my mother home to look after my sister. (Exhibit 99 - R. v. 34, p. 50)

Although this statement and even the passage quoted contains assertions of fact which are not supported by the documentary evidence, it appears that John Pratico is asserting no complaint with respect to whether or not his mother was present in the interview room. As can consistently be seen in this case, the Sydney City Police certainly took the approach during this investigation to keep in contact with parents and did not covertly interview their children.

198. Mrs. Pratico mainly confirms what was related by John Pratico. After satisfying her concern that John would get his meals on that Sunday, she left after about five or ten minutes (T. v. 13, pp. 2259-2266, 2293-2296). Margaret Pratico did not know that her son gave a second written statement to the Police, leading to the inference that she was neither at the Police Station nor did she know anything about John being interviewed again (T. v. 13, p. 2300). However, this Commission has some contrary evidence from John Pratico and it may be that the passage of years has either caused Mrs. Pratico to forget entirely about the second statement, or to merge the experience of being at the Police Station twice into one.

Chant

199. With respect to Maynard Chant, when he was

discovered on the Friday night his father was ultimately called and Maynard was turned over to him for transport back to Louisburg from Sydney (T. v. 5, p. 792). However, Chant indicated that his father was probably "at his limit" with Maynard at the time (T. v. 5, p. 793). Chant was fourteen years of age at the time of the stabbing (T. v. 5, p. 799). He acknowledged that it was in his habit to lie:

> If I was doing something that wasn't right in my parent's eyes. Giving in to maybe some mischief of something. It was - it's not, it's something that was done in our home, lying. I was always told to tell the truth. I was brought up to tell the truth. But I don't know why I lied. I Just probably lied to cover up or basically why young people lie. (T. v. 5, pp. 800-801)

200. Maynard Chant's first subsequent contact with the Sydney City Police came on Sunday, May 30, 1971 when the police were found parked in the Chant driveway at Louisburg when the Chants arrived home from church in Sydney (T. v. 20, pp. 3524-3425). Beudah Chant may well be confusing the car in the driveway with Sunday because she says at that time the police were suggesting that Maynard had not told the complete truth - a fact which she says was also mentioned to her by a police officer who came to her door on Friday, June 4, 1971 (see Compare T. v. 20, pp. 3525-3526 with p. 3534). Other evidence from "Red" Michael MacDonald indicates that when he and MacIntyre went to Louisburg on Sunday, Maynard was not home so MacIntyre spoke to either Chant's mother or father, after which Chant was found at a baseball field somewhere on the Louisburg Highway, at which time

MacIntyre, Maynard Chant and MacDonald proceeded back to Sydney (T. v. 10, p. 1694). Maynard Chant himself recalls driving with one police officer on the Louisbourg-Sydney highway as far as Catalone and some questions being asked while the car was stopped at the side of the road (T. v. 5, pp. 796-797). Chant also recalls being questioned in the driveway at his home on the Sunday after getting home from church (T. v. 5, pp. 795-796). Chant was unable to place in time when he went into Sydney - whether it was on the Sunday or within the next three or four days (T. v. 5, pp. 797, 839). Elsewhere Chant states that he does not recall any contact with the police between May 30, 1971 and June 4, 1971. Chant says the May 30, 1971 statement was taken in the police car while in his parents' driveway at Louisbourg (T. v. 5, pp. 808, 809, 814). However, Chant also gives evidence about being intimidated by Donald Marshall, Jr. at the Sydney City Police Station just before being asked to give his statement (T. v. 5, pp. 830-831). Chant was unsure about any contact with the Sydney City Police between May 30 and June 4, 1971 at all (T. v. 5, pp. 846-848).

201. It is respectfully submitted that with respect to the May 30, 1971, statement John MacIntyre and "Red" MacDonald drove to Louisbourg and were waiting in the Chant driveway when the family returned from church. A discussion was held between John MacIntyre and the parents as a result of which Maynard Chant went to Sydney in the custody of the police officers without the company of a parent. It appears from the evidence that Catalone

would have been passed on the way from Louisbourg to Sydney, but how it fits into the narrative of events here is a mystery. Maynard Chant did not mention it in his statements to the R.C.M.P. in 1982 (Exhibit 99 - R. v. 34, pp. 47-48, 81-83), though the latter statement does have a reference to Maynard Chant being driven to Sydney at some point by the Crown Prosecutor. It is respectfully submitted that it is not possible to conclude that there was some third interview besides May 30, 1971 and June 4, 1971 involving John MacIntyre. The important point is that the parents were consulted by John MacIntyre prior to there being any discussions with Maynard Chant, and it may be presumed that there was no objection by either Maynard Chant or his parents if the questioning took place for at least some time on Chant property and later well away from the control of the Chants in Sydney.

202. The second June 4, 1971 statement is much clearer with respect to parental involvement. Maynard Chant and Beudah Chant agree that when they were contacted on June 4, 1971 for further questioning by the Sydney City Police, and both went to meet the Sydney City Police at the Louisbourg Town Hall (T. v. 5, p. 854; T. v. 20, p. 3535). Wayne Magee says that he invited Beudah Chant to attend (T. v. 20, p. 3628).

203. Maynard Chant acknowledged in evidence before this Commission that by June 4, 1971 his parents certainly understood the seriousness of speaking with the police and had admonished Maynard to tell the truth (T. v. 5, p. 849). Beudah Chant

confirmed this indicating that she had told Maynard after the Sunday statement:

> "Well, Maynard, if you're not telling the truth, you'd better tell the truth because this is very serious and, you know, you might get in trouble yourself if you - " because he was on probation and he said he was telling the truth. (Emphasis added) (T. v. 20, p. 3532).

For his part Maynard Chant said that he was bothered quite a bit about having signed the false statement on May 30, 1971 (T. v. 5, p. 843). Chant also indicates that he was probably ashamed (T. v. 5, p. 860). Chant perceived when his mother kept telling him to make sure that he told the truth that she was getting upset (T. v. 5, pp. 855-857) - and while Beudah Chant does not say that she was upset and neither does Wayne Magee (T. v. 20, p. 3638), Beudah Chant and Maynard Chant were united on the fact that Beudah's prime concern was to make sure that Maynard was telling the truth (T. v. 5, p. 863). Maynard Chant summarized his relationship with his parents at that time on the basis that "I was doing a lot of wrong and I was more or less concealed within myself at that time" (T. v. 5, p. 860).

204. Beudah Chant says that after some period of time Beudah Chant believes that John MacIntyre asked her to leave thinking that Maynard might talk more freely if she was not there (T. v. 20, p. 3538). Beudah Chant agreed to leave (T. v. 20, p. 3538), made no objection to leaving (T. v. 5, p. 857), and she herself was of the view that if she did leave Maynard would open up with what he knew to the police (T. v. 20, pp. 3539-3540).

Within approximately 20 minutes of Beudah Chant leaving the statement was finished (T. v. 20, p. 3453). Beudah Chant had been in the hallway and had heard no banging of tables or raising of voices while she had waited for him (T. v. 20, pp. 3543, 3566-3567).

205. It is respectfully submitted that it is unnecessary for the purposes of the parental presence issue to go beyond the assertion of Maynard and Beudah Chant that she at one time left the room where the statement was being taken. John MacIntyre and William Urquhart both recalled that everyone whose name is listed at the end of the statement (Exhibit 16 - R. v. 16, p. 54) was indeed present throughout the taking of the statement. Wayne Magee does not recall Beudah Chant leaving at any time (T. v. 20, pp. 3633-3634, 3644), and thus his evidence may be supportive of MacIntyre and Urquhart.

206. However, it is respectfully submitted that when the facts are assessed that Maynard Chant felt himself in an uncomfortable position due in part at least to repetitive admonitions by his mother to tell the truth, and the fact that Beudah Chant herself felt that leaving the room where the statement was being taken was the most appropriate approach in the circumstances, no criticism can be sustained that MacIntyre was acting outside of established legal procedures at that time. Indeed, Maynard Chant perhaps made the most compelling argument for this when he stated to counsel for Donald Marshall, Jr. that if his mother had stayed he would have continued to say

that he had not seen anything:

> — I would just use those words, "I didn't see nothing" (T. v. 6, p. 964),

when in fact what he now admits to be his appropriate position that what he intended to convey was that he had not seen anything about a knife going in to the victim (T. v. 6, p. 1054).

O'Reillys

207. Mary O'Reilly (Csernyik) was fourteen years of age in 1971 and gave a statement to the Sydney City Police on June 18, 1971. She recalls that either her mother and father or just her mother picked her up at school that day and took her to the police station (T. v. 18, p. 3293). The police did not come to the school to get her, and therefore contact for this statement must have been made first with the mother. Mary O'Reilly testified that her mother did not go into the statement-taking room with her, but she does not know if her mother waiting outside (T. v. 18, p. 3293).

208. Catherine O'Reilly (Soltesz) was Mary's sister and walked into the statement-taking room before Mary's statement was finished (T. v. 18, p. 3294; T. v. 19, p. 3376). Catherine O'Reilly testified that she had been picked up at school by the police <u>through</u> the principal's office (T. v. 19, p. 3374). Catherine O'Reilly did not give a straight answer at first to the question of whether her mother was still present at the police station when she arrived:

> Q. Were you alone or was your sister -
>
> A. I was alone.

Q. Was your mother there?

A. I was alone. (T. v. 19, pp. 3374-3375)

but later stated:

Q. Was your mother at the police station?

A. I don't remember her being there.

Q. Did you ask if she could come down?

A. No. (T. v. 19, p. 3377).

209. It is respectfully submitted that his evidence shows that there is a substantial probability that the mother of the O'Reilly girls had been appropriately informed about the police interest in speaking with her daughters, and that she was at the police station. Contact was made through the parent, as well as through the appropriate educational authorities. It is respectfully submitted that there can be no criticism of the approach of the Sydney City Police with respect to the O'Reilly statements on this question of informing the parents or school authorities and indeed quite possible having a parent at the police station while the daughters were being questioned. There is no evidence to suggest that the mother of the O'Reilly girls was refused access to the room where the statements were being taken.

Harriss

210. Patricia Harriss was contacted on June 17, 1971 to speak with the Sydney City Police through her mother, Eunice (T. v. 16, p. 2951). Unlike any other formal statement except for

that taken from Maynard Chant on June 4, 1971, the evidence is clear that the police interviewing of Patricia Harriss commenced in the presence of Patricia's mother Eunice (T. v. 16, pp. 2953-2955). Patricia Harriss does not recall her mother being present with her but knows that her mother does recall this (T. v. 16, pp. 2795, 2796, 2879, 2925). Patricia Harriss does recall that once she was let out of the interview room to see her mother indicating that her mother had not been in the same room with her (T. v. 16, pp. 2799-2800, 2817, 2867, 2913). Eunice Harriss was waiting outside on a small bench (T. v. 16, p. 2800, 2960). Eunice Harriss states that she left the room where the statement was being taken after an hour or an hour and a half on John MacIntyre's request. Eunice Harriss did this even though Patricia Harriss had been upset "for quite awhile" and had been crying (T. v. 16, p. 2959). Patricia Harriss does not recall indicating to her mother even when let out of the room as to why she (Patricia) was so upset, and Patricia does not recall any effort made on her own or her mother's behalf to be in the interview room together (T. v. 16, pp. 2867-2868). It never entered Eunice Harriss' mind to go back into the room once she left and she did not ask, nor was she asked to do so (T. v. 16, p. 2962). Eunice Harriss recalls that it was very late when she and her brother, who had since arrived, saw Patricia again, at which time they took her home (T. v. 16, p. 2986).

211. It is respectfully submitted that what is crucial here in a decision as to whether or not the Sydney City Police

acted appropriately with respect to parental presence is what Eunice Harriss as the responsible parent thought in 1971. Eunice Harriss was aware that Patricia had been upset "for quite awhile". Inside Eunice Harriss felt that she wanted to leave the police station with her daughter but at the same time:

> ...I also felt that at a time like this and something so dreadful having happened, it's best to get it at that moment and that's why I was willing to stay along there with Patricia. (T. v. 16, p. 2959).

Eunice Harriss also felt that Patricia's story was a bit "far-fetched" though it was unusual for Patricia to continue on about the story if it was not true:

> It sounded like Hallowe'en to me....It wasn't something that you'd expect to hear about this long coat and the old man and the long hair and - but I - I went with Patricia. I believed her. (T. v. 16, p. 2958; see also T. v. 16, p. 2966).

212. When Eunice Harriss and John MacIntyre left the room MacIntyre asked politely if Eunice "would mind leaving the room" (T. v. 16, pp. 2956, 2992). MacIntyre apparently advised Eunice Harriss that:

> Sometimes it works out better this way because he felt Patricia was not co-operating (T. v. 16, p. 2956).

Eunice Harriss acknowledged that she could have told John MacIntyre, whom she knew from when both of them had been children, that she wanted to stay in the interview room because her daughter had been crying, but the way Eunice Harriss saw it in 1971 was that she should co-operate with the police and in the

end it would be to Patricia's benefit (T. v. 16, pp. 2992-2993).

213. It is respectfully submitted that this evidence demonstrates that John MacIntyre followed appropriate steps and was well within the law applicable at the time in relation to Patricia Harriss. The parent was at first present, and indeed was being a witness to the taking of the statement of Patricia. There were difficulties during which Patricia became upset to the point of tears. Eunice Harriss considered all of this when John MacIntyre asked her politely if she would mind leaving the interview room because it was his impression that Patricia was not co-operating - and we may imply here, not co-operating because of the presence of Eunice Harriss. Without knowing precisely what was going on in Patricia Harriss' mind, that is all John MacIntyre would have had to work with - his own impressions. Eunice Harriss considered that this was a valid approach to dealing with the apparent difficulties, and removed herself from the interview room.

214. Even today Eunice Harriss doubts that it would have been of assistance to Patricia if Eunice had been present throughout the conversations with the police (T. v. 16, p. 2982). Eunice Harriss' concern was not with being present or being outside. Eunice Harriss' concern as expressed at these Commission hearings was with respect to the wish that we could "get to the truth in a kinder way, perhaps" (T. v. 16, p. 2982). The substance of these concerns is dealt with elsewhere but there is nothing in the evidence relating to Eunice Harriss'

presence or absence from the interview room which itself causes any justifiable or lasting concern.

Other Witnesses

A statement was taken from Alanna Dixon on May 30, 1971, when she was fifteen years of age (Exhibit 16 - R. v. 16, p. 24), from Scott MacKay who was sixteen years of age on June 2, 1971 (Exhibit 16 - R. v. 16, p. 31), from Lawrence Paul who was fourteen years of age on June 2, 1971 (Exhibit 16 - R. v. 16, p. 34), and from Barbara Vigneau who was sixteen years of age on June 23, 1971 (Exhibit 16 - R. v. 16, p. 82). All other statements in the investigation which have not been otherwise dealt with in this section are from persons seventeen years of age or greater. Of the statements listed at the beginning of this paragraph, this Commission only has evidence with respect to the Scott MacKay statement on the question of whether or not parents were present - except of course no indication appears on these statements that anyone other than the police officers and the witness were present.

215. Scott MacKay says that he was all alone with the police for approximately four hours on Wednesday, June 2, 1971 (T. v. 4, pp. 653, 666, 668-669). At no time did any police officer offer him an opportunity to have an adult present with him (T. v. 4, p. 669). At the same time MacKay never made any request to that effect (T. v. 4, p. 684). MacKay felt "detained", at least in a psychological sense, but wanted to satisfy the police before he left about what he knew (T. v. 4, p.

685). It is significant that MacKay testified that when he returned ~~home~~ his mother knew where he had been (T. v. 4, p. 685). It is also extremely significant to note that at the time when he was asked to come in for questioning he trusted the police and it was only as a result of discovering what a bad experience he found it to be that he now says he would have liked to have the opportunity to have a parent present (T. v. 4, p. 669). The whole of this evidence would indicate that MacKay's parents knew where he was, and the reason for his attendance there - to be questioned. The decision or feeling now on the part of MacKay that he might have preferred to follow a different course in 1971 does not affect the question of whether John MacIntyre acted appropriately in all the circumstances as they existed and were understood in 1971.

Conclusion

216. This Commission may wish to give serious consideration to any special rules which may be developed to guide police in balancing the objective of detecting crime with the rights of young persons to deal with the authorities in the comforting presence of a friendly relative or adult. When looking at this matter in the context of what happened in 1971, it cannot be said that the lack of a mandatory parental presence during the taking of witness statements was the cause of false evidence given at trial. What this Commission can say is that it is appropriate for the police to contact young persons to be interviewed through their parents - as occurred in this case.

Sometimes it is appropriate to have a parent sit in, particularly if the parent insists, and sometimes this may not be appropriate, particularly if the young person insists on privacy.

217. The difficulty created by an inflexible rule is demonstrated by the "similar fact" evidence which Commission counsel chose to call in relation to Joan Clemens. Essentially that incident involved the questioning of Joan Clemens by John MacIntyre in the presence of Emily Clemens (T. v. 19, pp. 3445-3454) - in different rooms but with an open door between. The questioning commenced but Emily Clemens interrupted it. "I don't know what he wanted her to say but she - she wanted - he just kept throwing the questions at her." (T. v. 19, p. 3457). Joan Clemens was apparently persisting in a denial about an alleged offence of giving liquor to minors committed by Donald Marshall, Jr. Name-calling ensued between the mother and John MacIntyre according to Emily Clemens (T. v. 19, p. 3460). Emily Clemens then sat in on the statement for a period of time and her daughter's denials continued (T. v. 19, p. 3465). Eventually everyone left at the same time (T. v. 19, p. 3468). Emily Clemens was obviously upset because she believed that her daughter's persisten denial was the truth (T. v. 19, p. 3477, 3482). Ultimately Joan Clemens' father went with her to Court and she testified that she had in fact received liquor from Donald Marshall, Jr. (T. v. 19, pp. 3484-3485, 3503, 3504).

218. While the method of interrogation is a separate subject, it is respectfully submitted that in the course of an

investigation the police require the freedom to determine that the presence of a parent may inhibit obtaining the truth from a witness. In this case the only individual of whom it is proved the parent was not at the police station and who may not have otherwise been spoken to by the police was Scott MacKay's mother. John MacIntyre therefore satisfied the obligations upon himself according to the law and appropriate practice in 1971.

I. Failure to Direct the Conducting of an Autopsy

An Autopsy as a Source of Information

219. Testimony from R.C.M.P. Officers indicated that it would be a priority in a murder case to have a post-mortem or autopsy for "an endless line of reasons", including, for example:

> ...everything from naturally blood samples for alcohol, drug determination, from examination of the stab wounds, the number of wounds, the direction of the wounds in an effort to probably re-enact the crime to determine which direction the person had stabbed from up or down; again the depth so that you could possibly have some idea of what kind of weapon you were looking for. You would be looking for anything under the fingernails or what-have-you to determine if there was an altercation, if there was scratching, hairs. You would probably look for stomach contents in case you had to determine where the victim had been prior, had he eaten at restaurants or, you know, some determination in that manner. It depends on the case whether you would be looking at an endless line of endless pool of evidence.
>
> Joseph Terrance Ryan (T. v. 11, p. 1864)

220. Douglas Wright also testified that he would have been interested in having an autopsy done for the purpose of determining many things, including:

> ...the cause of death but there's other things, fingernail scrapings, finding hairs and fibres on that person that doesn't belong to that particular person, it belongs to somebody else, this type of thing.

Q. Can you get some indication of the dimensions of the weapon from an autopsy?

A. Oh, yes. Oh, yes.

Q. Would the angle of entry and these sort of things be of interest to the investigator?

A. Yes. Yes.

Q. And would that be the type of procedure that you would expect to be followed by a competent policeman in 1971?

A. Sure.

(T. v. 28, pp. 5261-5262).

Part and parcel of the post-mortem would be to have the deceased's blood tested for alcohol or drugs (T. v. 28, p. 5288). However, Douglas Wright also indicated that an autopsy was not invariable in 1971:

> It's a matter of judgment and in '71 - but very much a must that there be one in circumstances such as that and as I indicated previously, any indication of foul play or anything of that nature there would be a post-mortem or an autopsy.
>
> (T. v. 28, p. 5292)

However, Wright testified that the ultimate decision would be left up to the Medical Examiner based upon a recommendation from the police (T. v. 28, pp. 5292-5293).

221. Yet another R.C.M.P. Officer, Murray Wood, who testified to having investigated a homicide in Cape Breton in the Fall of 1971, indicated that an autopsy was "absolutely essential" in a homicide investigation. However, Wood was of the

view that autopsies were performed at the request of either the Medical Examiner or the Crown Prosecutor (T. v. 10, pp. 1815-1816, 1840). Wood was unsure as a police officer and murder investigator of the procedure to follow in arranging for an autopsy. Wood felt it would be normal for the investigating officer to discuss with the Crown Prosecutor the desirability of ordering a post-mortem (T. v. 10, pp. 1835-1836, 1840). The fact that such discussions would occur indicates that autopsies are not invariably ordered.

222. Staff Sergeant Harry Wheaton identified the lack of an autopsy as having hampered his re-investigation in 1982 (Exhibit 19 - R. v. 19, p. 111). However, Wheaton never mentioned the absence of an autopsy when asked in 1983 about instances of improper police practices or procedures (Exhibit 20 - R. v. 20, pp. 8-13), nor in his opinion letter of July 14, 1986 (Exhibit 20 - R. v. 20, pp. 63-65).

Deciding Against an Autopsy

223. Dr. Naqvi was the attending doctor on Sandy Seale when he was brought to the hospital early in the morning of May 29, 1971 (T. v. 14, p. 2509). Naqvi's activities in relation to Seale are documented (Exhibit 53 - R. v. 22; Exhibit 16 - R. v. 16, pp. 159-164) and his opinions and observations have also been exhaustively reviewed (T. v. 14, pp. 2508-2600; Exhibit 13, - R. v. 13, pp. 1-65). As to the performance of an autopsy, Naqvi indicated that in the circumstances of a violent death the body must be released by the Medical Examiner who was Dr. Sandy

MacDonald at the time:

> ...he has to okay whether he thinks the autopsy is necessary or it isn't necessary because in this particular case since he had the injuries and they were all - the injuries were documented, that may be - this may be a factor, but generally speaking it is the Medical Examiner who has to okay them and any patient who dies - who dies within twenty-four hours in this kind of a situation, they - it's his responsibility.
>
> (T. v. 14, p. 2562)

Naqvi indicated that it would have been his responsibility as the doctor for the patient to notify the Medical Examiner - as may or may not have been done (T. v. 14, pp. 2562-2563, and see T. v. 14, pp. 2587-2589).

224. Dr. Naqvi was of the view that an autopsy was not necessary to determine the cause of death. Dr. Naqvi considered no other purpose. Even today an autopsy is not an automatic thing and the objective remains to determine the cause of death (T. v. 14, p. 2565-2566). Dr. Naqvi acknowledged that he was not a pathologist (T. v. 14, pp. 2570-2571) and that no specialized tests or examinations are done in the course of surgery which one would anticipate could be dealt with by a pathologist (T. v. 14, pp. 2577-2581, 2583-2586). Naqvi still felt able to express the opinion for the Commission that any surgery would have obliterated Seale's wound to an extent that it would be difficult for a pathologist to later form any opinions about the wound itself in any event (T. v. 14, pp. 2586-2588).

Whether an Autopsy Should Have Been Done

225. Judge D. Lewis Matheson, who worked as assistant prosecutor ~~in~~ 1971, indicated in testimony to this Commission that he was surprised that there was no autopsy report prepared. Matheson raised it with the Prosecutor, Donald C. MacNeil, whose "emphatic" reply was:

> So what! We haven't got an autopsy report. If that's the biggest worry with this, I think we can handle that all right.
>
> (T. v. 26, p. 4944)

Matheson also appears to have acknowledged that the reason for no autopsy was because the cause of death was apparent (T. v. 26, p. 4944). Judge Matheson was not asked about the role of the Crown in directing that an autopsy be done.

226. John MacIntyre stated his position with respect to a post-mortem in this case (T. v. 32, pp. 5971-5972). John MacIntyre did not disagree with R.C.M.P. witnesses who suggested that a post-mortem was a standard technique in all homicide cases. However, John MacIntyre testified that having considered that:

> (a) Seale was taken to the hospital;
>
> (b) Seale lived for twenty hours;
>
> (c) A specialist was handling the case and would be speaking with the coroner; and
>
> (d) The attending physician had had no trouble knowing what the cause of death was or what the injuries were,

he decided that he need not press for an autopsy. Responding to "Red" MacDonald's testimony (T. v. 10, p. 1719) that it was the

police who made the decision about the necessity of a post-mortem and would ~~make~~ the request of the Medical Examiner, John MacIntyre explained:

> That's if body [sic] is found outside but this chap was taken to the hospital and he died in the hospital and I thought that that was sufficient to be honest with you.
>
> (T. v. 32, p. 5972).

227. Although the views of Dr. Naqvi in relation to an autopsy (which appear to have been relied upon by John MacIntyre) were discounted by some counsel (e.g., T. v. 14, p. 2587) and treated with a level of incredulity by Commission counsel (e.g., T. v. 14, pp. 2599-2600) each of Naqvi's opinions with respect to the usefulness of an autopsy in this case were supported by Dr. Roland Perry - though upon more expert grounds. As to whether there ought to have been an autopsy, Perry stated that:

> Well, from the general protocol point of view, yes, but from the point of view of learning anything more about what happened you wouldn't have learned anything more. We know he was stabbed around the bellybutton. On surface anatomy that corresponds to the disc between the third and fourth lumbar vertebrae. Those are the low backbone vertebrae. Dr. Naqvi said in his records that the stab wound in the aorta was just below the renal vein, that's the vein to the kidneys. We know from surface anatomy that the...this corresponds to the disc between the first and second lumbar vertebrae. So you've got the bellybutton wound between three and four, the wound in the aorta between one and two. So clearly the wound...the stab wound was going in a somewhat upward direction. The wound has been altered almost, well, it's been altered

> completely because the stab isn't extended up, it's been extended down. The person who would have the best idea as to what the wound looked like obviously would be the people who first saw it, the surgeons, the medical people in the hospital. The person at that time was alive. In the morgue he's dead. Rigor mortis has set in. The body has been sutured. The whole bodily parts, everything has been altered. So, that you're not going to get anything of any substance in a case like this....So this is the type of case where the medical end, again like most homicides, is not very...it's not, ah, a mystery. It's straightforward. It's one single stab wound to the belly. The how it happened is not the problem, the who did it is...was always the problem.
>
> (T. v. 80, pp. 14190-14192).

228. In Perry's opinion nothing could have been determined by an autopsy which would have assisted the police in carrying out their investigation (T. v. 80, p. 14193). Perry based this opinion upon the absence of any notations in the records about other external observations, and the fact that Seale was in hospital for twenty hours before he died during which his body "was altered extensively" (T. v. 80, pp. 14194-14199; 14202-14203). There would have been no urine sample to take. Some eyeball fluid may have been drawn - though certainly it would have been of questionable reliability (T. v. 80, pp. 14203-14204). The idea of securing any reliable evidence through "fingernail scrapings" fell into "the mythical character" (T. v. 80, p. 14199) of autopsies.

229. Another opinion expressed by Dr. Perry, for what it was worth, was that from his review of what Commission counsel

supplied to him, the Medical Examiner was not in fact notified about the ~~death~~ of Sandy Seale. Unquestionably the Medical Examiner ought to have been notified (T. v. 80, pp. 14189-14190). If there was any failure here, it is this one which is determinative.

230. In Dr. Perry's professional opinion, the eagerness of some police officers for a rule of invariable autopsies (as expressed by some R.C.M.P. witnesses before this Commission) is inappropriate and unnecessary:

> Q. Have you ever had a case where you have determined, or one of your medical examiners, that an autopsy is not required and the police insist that one be carried out?
>
> A. It's happened occasionally but usually the reason for the insistence of the autopsy has no basis in any reasonable request. I've been involved in a few like this where the medical examiner has called and said the police insist in having an autopsy when it's clear from the story that one is not necessary. And I've checked with the police. What they really wanted was want to know whether the guy was drinking. Well, of course, you can check that out without doing an autopsy. This is what they're interested in. So there's usually no real problem there. The only problem is in these cases where, in fact, is all they're wondering was whether the person was drinking and they feel that you can't tell it unless you do an autopsy when it's quite easy to take a blood sample without doing an autopsy.
>
> (T. v. 80, pp. 14181-14182).

If Dr. Perry and other professional medical witnesses are not

persuaded of the need for automatic autopsies, it is scarcely appropriate to fault John MacIntyre for not having an invariable autopsy rule in 1971. His predecessor, Norman D. MacAskill, did not adhere to such a philosophy either (T. v. 17, pp. 3033-3035).

231. John MacIntyre was not required, from a legal point of view, to ensure that a complete autopsy was done. Policemen are neither medical professionals nor legal professionals. It is respectfully submitted that the investigating police officer has to take the medical evidence as he finds it, and then put it all in the hands of the Crown which has the authority to direct further and better medical evidence if that appears legally necessary or appropriate: e.g., The Queen v. Garrow and Creech (1896), 1 C.C.C. 246 (B.C.S.C.). That is why, we respectfully submit, so many witnesses suggested that one of the two officials capable of ordering an autopsy was the Crown Prosecutor. The other official is the Medical Examiner, who would be sensitive to unanswered physiological questions which arise from physical observation. With respect, that is as it should be.

Conclusion

232. It is respectfully submitted that the most rational theory to draw from the evidence of all of these witnesses is that Dr. Naqvi as the attending physician had an obligation to notify Dr. Sandy MacDonald of the death of Sandy Seale on Saturday, May 29, 1971. Whether Naqvi did or did not, and he probably did not considering that Naqvi instead of MacDonald signed the Death Certificate and Naqvi has no specific note of

speaking with MacDonald, it would have been the responsibility of the Medical Examiner to order an autopsy to be done by one of the pathologists in the area (e.g., by Robert Mathieson - T. v. 14, p. 2590). As R.C.M.P. Officer Murray Wood indicated, autopsies were performed at the request of either the Medical Examiner or the Crown Prosecutor. Donald MacNeil did not feel he needed one. The investigating police officer's role would be limited to discussing and possibly recommending an autopsy to either the Medical Examiner or the Crown Prosecutor. John MacIntyre relied upon the views expressed to him by Dr. Naqvi and therefore did not press for a post-mortem. There is no evidence that even if John MacIntyre had pressed for an autopsy that one would have been done.

233. It is respectfully submitted that in all the circumstances there was nothing improper or incompetent about John MacIntyre relying upon the observations and abilities and advice of a well-qualified surgeon. The fact that Dr. Naqvi did not notify Dr. MacDonald cannot be placed on John MacIntyre's shoulders. In all of this evidence about autopsies, there is no suggestion of any ulterior purpose on the part of anyone in not obtaining an autopsy. As to the consequences of this judgment by John MacIntyre not to press either Donald C. MacNeil or Dr. Sandy MacDonald to order an autopsy, this Commission knows from the consistent conclusions of both Dr. Naqvi and Dr. Perry that there was not really anything to gain from either an investigational or a medical point of view by doing an autopsy in this case. It is

respectfully submitted that this view of the facts and circumstances should be adopted by this Commission in preference to that of the R.C.M.P. Officers appearing before the Commission who suggested that an autopsy was always necessary, and that somehow the investigating officer had to ensure that it was done.